

# The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgments

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Damien Geradin<sup>(\*)</sup> and David Henry<sup>(\*\*)</sup>

## I. Introduction

Fines represent the principal tool in the European Commission's enforcement of EC competition law. Unlike in the United States where there is a formidable congeries of weapons against undertakings which breach anti-trust law, there are no criminal penalties, such as imprisonment for individuals in the EC. Moreover, private enforcement of EC competition law is still minimal.<sup>1</sup> Thus, fines represent the main tool to remedy and deter violations of competition law. The European Court of Justice (hereinafter, the "ECJ") indicated in *Musique Diffusion France* (Pioneer), that the underlying rationale for the imposition of fines is to ensure the implementation of Community competition policy.<sup>2</sup> The meting out of fines therefore serves two objectives (i) the suppression of illegal activity and (ii) the prevention of recidivism. During the first three decades in which the Commission imposed fines for breaches of EC competition law, the Commission was criticised for the obfuscation surrounding how it determined a given fine.<sup>3</sup> During this period, there were no guidelines providing a reference point from which the Commission could impose fines leading to a lack of transparency in the fining process. There was thus a tendency to litigate before the courts in the expectation that the fine would be reduced. In addition, fines were generally fixed at such a low level that it was questionable whether they had any deterrent effect.

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<sup>(\*)</sup> Member of the Brussels bar. Professor of Law and Director of the Institute for European Legal Studies, University of Liège and Professor and Director of the Global Competition Law Centre, College of Europe, Bruges (email: [d.geradin@ulg.ac.be](mailto:d.geradin@ulg.ac.be)) This paper was prepared with the support of the PAI P5/32 initiated by the Belgian State, Prime Minister's Office – Federal Office for Scientific, Technical and Cultural Affairs.

<sup>(\*\*)</sup> Research fellow, Institute for European Legal Studies, University of Liège (Email: [dhenry@ulg.ac.be](mailto:dhenry@ulg.ac.be))

<sup>1</sup> See White Paper on Modernisation of the rules implementing Articles 81 and 82 of the Treaty, COM (1999) 101 final/2, May 12 1999, para. 39 where it is stated that "complainants remain reluctant to apply to the national courts [...] when they consider they have been harmed by an infringement of Community law".

<sup>2</sup> See Judgment of the European Court of Justice, Case 100/80, *Musique Diffusion Française v. Commission*, [1983] E.C.R. 1825, para. 15 . See also Speech by M. Monti, "Fighting Cartels Why and How? Why Should we be Concerned with Cartels and Collusive Behaviour?" 3<sup>rd</sup> Nordic Competition Policy Conference, Stockholm, 11-12 September 2000 where he states "We can only reverse the tendency [of cartels] through tough enforcement that creates effective deterrence. The risk of being uncovered and punished must be higher than the probability of earning extra profits from successful collusion".

<sup>3</sup> See for example I. Van Bael who likened the fining process with that of a lottery, I. Van Bael, "The Lottery of EU Competition Law", (1995) 4 *E.C.L.R.* 237.

There has been a recent evolution in Commission fining policy, however. First, the promulgation of both the Commission Guidelines on fines in 1998 (hereinafter, the “1998 Guidelines”), which aims to make decisions over fines more transparent and impartial. Second, the toughening of the fines, which is particularly evident when one notes the condign fines of €462 million and €497 million imposed on Hoffman-La-Roche and Microsoft. Third, the development of the leniency notice, which provides an incentive for cartel members to admit to their anti-competitive conduct. Since the adoption of the 1998 Guidelines, the majority of the fines imposed by the Commission have been for cartel activity. The Commission has, however, shown an increasingly heavy-handed approach towards other infringements of Article 81 EC and abuses of a dominant position under Article 82 EC. Yet, it is not quite sure that these evolutions have reached their objectives as both the constituent elements of the 1998 Guidelines and the fining decisions, which are based on the 1998 Guidelines, are vague. This has left much room for conjecture as to how the Commission reached the final fine. The corollary of this is that there has been, as in the period preceding the 1998 Guidelines, a steady yet significant number of parties litigating before the courts. It is also still open to debate whether the fines imposed by the Commission are stringent enough. The *Microsoft* decision bears testimony to this.<sup>4</sup> This raises the issue of whether the EC should not turn to other forms of penalties, such as criminal penalties. This path is already being followed in some Member States (e.g., UK), but seems unlikely to be followed in the EC. The Commission can neither impose fines nor criminal sanctions on individuals in light of the wording of Article 81 EC. On the other hand, Article 83(1) EC stipulates that the Council “give effect to the principles set out in Articles 81 and 82”. This could be interpreted as encompassing sanctions on individuals as the effect of this would be to enhance the deterrent effect of the cartel prohibition. Article 23(5) of Regulation 1/2003 states, however, that decisions are not to be of a criminal law nature.<sup>5</sup>

The main purpose of the article is to provide a detailed analysis of the parameters taken into account by the Commission when imposing a fine, as well as the parameters used by the Court of First Instance (hereinafter, the “CFI”) when reviewing fines imposed by the Commission. In order to do this, we have reviewed all the Commission decisions and CFI judgments dealing with fines, which have been adopted since the publication of the 1998 guidelines. For each Commission and CFI judgment, we have identified the factors that have been taken into account to determine/review the fines imposed for infringements of EC competition law. The results of our analysis are summarized into two tables (one for the Commission decisions and one for the CFI judgments), which allow the reader to find for each case the factors that have been taken into account to determine/review the fines. This is the empirical side of the paper. While most of the papers analyzing the fining policy of the Commission discuss factors, such as the gravity or duration of an infringement, the presence of various mitigating circumstances, in a rather general or theoretical fashion, this paper provides precise data as to the elements that are most/least likely to be considered in the determination/review of fines. Thus, our table on the Commission decisions will, for instance, allow the reader to know in which cases, a cartel member was the leader and/or imposed coercive measures on other cartel members and to what extent this was considered as an aggravating circumstance. In turn, our table on the CFI judgments will allow the reader to

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<sup>4</sup> Commission decision of 24 March 2004, *Microsoft*, not yet published in Official Journal but on Europa website.

<sup>5</sup> Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (2003) O.J. L 1/1

identify the various reasons why, in a given case, the fine imposed by the Commission was reduced before the CFI.

Another aim of the paper is to give a critical look at the Commission decisions imposing fines to see whether the reasoning on which they are based is coherent. As will be seen, it is often difficult to understand the logic of the fines imposed by the Commission. Identical factual scenarios will be treated differently, while different factual scenarios will be offered the same treatment. By contrast, we will not deal with theoretical issues, such as the optimal level of the fines or whether criminalization of competition law violations is desirable as there is abundant literature on this.<sup>6</sup>

The paper is structured as follows: Part II examines the Commission's fining policy prior to the introduction of the 1998 Guidelines. In this part, we outline the methodology of the Commission when assessing fines and examine the flaws in its approach when calculating the final amount of the fine. Part III analyses the 1998 Guidelines and evaluates whether it has rectified the weaknesses of the Commission's methodology prior to 1998. We further look at both the 1996 and 2002 leniency programmes. Part IV reviews the Commission decisions imposing fines with reference to the constituent elements of the 1998 Guidelines. Part V discusses the CFI judgments where the fines in Commission decisions, since the introduction of the 1998 Guidelines, have been reduced. Part VI provides for a short conclusion.

## II. Commission Fining Policy Prior to 1998

Prior to 1998, the Commission's freedom of manoeuvre when setting fines was couched in the loose parameters of Article 15 (2) of Regulation 17/62,<sup>7</sup> which lays down that the Commission "may by decision impose on undertakings or associations of undertakings fines of from 1000 to 1.000.000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement",<sup>8</sup> where, either intentionally<sup>9</sup> or negligently,<sup>10</sup> they violate Article 81(1) or

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<sup>6</sup> See for example, C. Craycraft, J.L. Craycraft, and J.C. Gallo, "Antitrust Sanctions and a Firm's Ability to Pay", (1997) *Review of Industrial Organization* 171. See also A.I. Gavil, W.E. Kovacic and J.B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, Thomson-West, 2002 p. 1040 et seq. With respect to criminal sanctions see D. Baker, "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging", George Washington Law Review Symposium on Antitrust Remedies, March 22-23, 2001.

<sup>7</sup> Council Regulation 17/62 of 16 February 1962 implementing Articles 81 and 82 of the Treaty, (1962) O.J. L 13/204.

<sup>8</sup> According to Article 2 of Regulation 1103/97, (1997) O.J. L162/1 every reference in a legal instrument to the ECU shall be replaced by a reference to the euro at a rate of one euro to one ecu. What turnover to be taken into account is not specified in Regulation 17/62. The *Pioneer* decision (Commission decision of 14 December 1979, (1980) O.J. L 60/1), however, made it clear that the 10% ceiling for fines refers to the total (worldwide) sales of all products, not only those concerned in the infringement.

<sup>9</sup> Actual knowledge of the Treaty provisions is not a prerequisite to a finding of intentional infringement. In the Judgment of the European Court of Justice, Case 19/77, *Miller v. Commission*, [1978] E.C.R. 131, the Court stated "...the clauses in question were adopted by the applicant and the latter could not have been unaware that they had as their object the restriction of competition between its customers. Consequently, it is of little relevance to establish whether the applicant knew that it was infringing the prohibition contained in Article 85". See also Judgments of the Court of First Instance: Case T-29/92, *SPO v. Commission*, [1995] E.C.R. II-289, 402, paras. 356-358 and Case T-61/89, *Dansk Pelsdyravlserforing v. Commission*, [1992] E.C.R. II-1931, 1991 and 1992, para 157. See also Judgment of the European Court of Justice, Case C-279/87, *Tipp-Ex v. Commission*, [1990] E.C.R. I-261. The element of intention will be especially easily satisfied if a company has been the subject of a previous finding of breach of the EC competition rules for the same practices, see Commission decision of 20 June 2001, *Michelin*, (2002) O.J. L 143/1, para 352. The concept of "intention" refers to an intention to restrict competition and not to an intention to infringe the rules, see Judgment of the European Court

Article 82 EC. In fixing the amount of the fine, Regulation 17/62 further provided that regard shall be had to both the gravity and the duration of the infringement.<sup>11</sup> The flexible fining parameters within which the Commission worked were (and still are), however, circumscribed by the fundamental principles of Community law, such as the rule of proportionality, the principle of non-discrimination and the principle of *ne bis in idem*.<sup>12</sup> With regard to the principle of *ne bis in idem*, the ECJ stated in *Walt Wilhelm* that equity necessitates that an earlier sanction must be taken into account in determining the level of any subsequent sanctions to be imposed.<sup>13</sup> Within the EC this maxim translates into the setting off of any fines imposed in national jurisdictions against fines later imposed by the Commission. As we shall see below, however, one notable exception to this fundamental axiom of EC law is that the principle of *ne bis in idem* is inapplicable where the fines imposed by a non-EC competition authority and the Commission do not have the same purpose. Finally, judicial review serves as a further constraint on the Commission's wide discretion when imposing fines.

The first Commission fines came at the end of the 1960s where the co-conspirators in the *Quinine* cartel were reprimanded for stifling competition.<sup>14</sup> The Commission's fining policy at the end of the 1960s and throughout the 1970s was characterised by a light-handed approach towards anti-competitive conduct.<sup>15</sup> The Commission ranged on the side of caution in the imposition of fines until the *Pioneer* decision in 1979,<sup>16</sup> which represents a turning point in the Commission's stance towards fines for anti-competitive conduct. With this decision the Commission announced a far more severe fining policy with one of the parties receiving a fine of 4.350.000 units of account. The Commission's stiffened resolve in reinforcing the deterrent effect of fines is particularly marked when compared to the earlier decisions, in particular in *Quinine* where a total fine for all companies involved was a meagre 500.000 units of account. Indeed, prior to *Pioneer*, fines were steadfastly pegged at below 2% of the total turnover of a given undertaking.<sup>17</sup> In *Pioneer*, some of the fines represented up to

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of First Instance, Joined Cases T-305-307, 313-316, 318, 328-329 and 335/94, *Limburgse Vinyl Mij NV and others v. Commission*, [1995] C.M.L.R. 303, para. 1111.

<sup>10</sup> See Opinion of A-G Mayras in the judgment of the European Court of Justice, Case C-26/75, *General Motors v. Commission*, E.C.R. 1367; 1389, where he states "[...] the concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not foreseen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them".

<sup>11</sup> Article 15 (2).

<sup>12</sup> See Article 23 (2) of Council Regulation 1/2003, supra note 5. The principle of *ne bis in idem* is based on the principles of equity and proportionality entrenched in the constitutional law of the Community. It is confirmed by Article 50 of the Charter of Fundamental Rights of the European Union. It is also enshrined in Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. For a good discussion on the principle of *ne bis in idem* in EC competition law proceedings (double jeopardy) see W.P.J. Wils "The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis", (2003) 26 *World Competition* 131. Further for a long discussion on this principle see the Judgment of the Court of First Instance, Case 224/00, *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v. Commission*, E.C.R. II-2597, paras. 85 et seq, and the Judgment of the Court of First Instance in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v. Commission*, paras. 130 et seq.

<sup>13</sup> Judgment of the European Court of Justice, Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, [1969] E.C.R. 1.

<sup>14</sup> Commission decision of 16 July 1969, *Quinine*, (1969) O.J. L 192/5.

<sup>15</sup> See the Commission XIIIth Report on Competition Policy, European Commission, 1983, para. 63.

<sup>16</sup> Commission decision of 14 December 1979, *Pioneer Hi-Fi Equipment*, (1980) O.J. L 60/28.

<sup>17</sup> For example, in Commission decision of 2 January 1973, *Sugar*, (1973) O.J. L 140/17, the Commission had for the first time imposed a fine crossing the 1 million units of count threshold. This represented only 1% of the undertaking's turnover in sugar, however.

4% of total turnover.<sup>18</sup> The latter stages of the period before the introduction of the 1998 Guidelines bore testimony to the fact that the Commission's enforcement was more rigorous and sanctions increasingly draconian. This is shown by the €139 million, €113 million and €80 million fines levied in *Cartonboard*, *Cement* and *Steel Beams* respectively.<sup>19</sup>

With regard to the method employed by the Commission for the determination of fines, the period preceding the adoption of the 1998 Guidelines was epitomised by a reliance on a percentage of turnover in the relevant market, and to a much lesser extent on the illegal gains achieved by a company,<sup>20</sup> for the determination of fines. Invariably a figure of between 2 and 4% of EC turnover in the product in question was taken into account as the starting point.<sup>21</sup> The Commission's method of calculation was as follows:

1) Relevant turnover x percentage in respect of the gravity of the infringement x percentage in respect of duration = total (basic amount); 2) basic amount – reduction in the event of co-operation = amount of the fine.

Though this turnover method has never been formally backed by the ECJ, Advocate General Mayras in *Miller*, on the other hand, stated:

“the Commission's discretion as to the amount of a fine may be taken to lie in the range between 0 per cent and 10 per cent of the turnover of the undertaking concerned. [...] Accordingly, a fine of 10 per cent of turnover may be taken to be appropriate to an intentional infringement of the gravest kind and of considerable duration. At the other end of the scale, a fine of less than 1 per cent is appropriate for a merely negligent infringement, of the most trivial kind and continuing only for a short time”.<sup>22</sup>

Indeed, the attitude of the Commission during this period is marked by a reluctance to have any type of fine tariff,<sup>23</sup> this attitude being vindicated by a fear that a tariff could render the

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<sup>18</sup> The CFI stated that in *SA Musique Diffusion Française and others v Commission*, supra note 2, that the Commission, in *Pioneer*, had imposed considerably higher fines than in the past. Commentators such as M. Furse, in “Article 15 (2) of Regulation 17: Fines and the Commission's discretion”, (1995) 2 *E.C.L.R.* 114 state that this decision represents a watershed in the Commission's fining policy.

<sup>19</sup> Commission decision of 13 July 1994, *Cartonboard*, (1994) O.J. L 243/1; Commission decision of 30 November 1994, *Cement*, (1994) O.J. L 343/1 and Commission decision of 16 February 1994, *Steel Beams*, (1994) O.J. L 116/ 1. This increase was in line with the Commission's commitment to move closer to the maximum fine laid down in regulation 17, see XXIst Competition Policy Report, European Commission, 1992, para. 139.

<sup>20</sup> See Commission decision of 25 March 1992, *Eurocheque - Helsinki Agreement*, (1992) O.J. L 95/50 paras 80-81 where the fine imposed equalled the financial advantage gained from the anti-competitive behaviour.

<sup>21</sup> See M. Reynolds, “EC Competition Policy on Fines” (1992) *European Business Law Review* 263. See also Commission Press Release IP 1108 of 30 November 1994 concerning *Cement*, supra note 19, where the Commission stated that “Fines can in theory amount to 10% of a company's total turnover, but calculation is normally based on the Community turnover in the product concerned [...] the fines imposed on the associations are flat sums, since the associations do not have any turnover”. According to the Commission's reply to a written question concerning the *Cartonboard* cartel from the CFI, fines of a basic level of 9 or 7.5% of the turnover on the Community cartonboard market in 1990 of each undertaking addressed in the decision were imposed on the undertakings regarded as the ringleaders of the cartel and the other undertakings respectively. In *Cartonboard* 9% was taken for the ringleaders and 7.5% for the other undertakings involved.

<sup>22</sup> See supra note 9 at para 161. Wils has criticised this approach by stating that “If there is no legal reason to calculate fines as a percentage of turnover, an economic justification is not easy to find either. To achieve effective deterrence, fines should optimally be equal to the harm caused by the infringement, or alternatively equal to the benefit gained by the violator plus some safety margin, divided by the probability of detection and punishment”, W.P.J. Wils, “The Commission's New Method for Calculating Fines in Antitrust Cases”, (1998) 23 *E.L.R.* 255.

<sup>23</sup> See supra note 15.

deterrent effect of fines nugatory.<sup>24</sup> This argument is specious, however, as when fines are imposed to ensure deterrence there is an assumption that companies do carry out a cost-benefit analysis. So long as a system of tariffication is either detailed or flexible enough to take into account differences between individual undertakings and that the fine can be set at the optimal level then this will serve to deter companies from engaging in anti-competitive behaviour as it alters a potential perpetrator's balance of expected cost and benefit.<sup>25</sup>

Prior to the promulgation of the 1998 Guidelines on the method of setting fines, the Commission was consistently criticised for the vague and nebulous criteria in determining the fines it imposed.<sup>26</sup> Indeed, the fining procedure resembled a lottery with random figures simply magically appearing at the end of the decision.<sup>27</sup> A mathematical formula for the computation of fines did not exist in contrast to, for example, the US.<sup>28</sup> Further, for reasons of business secrecy the Commission did not clarify what percentage of turnover it applied in a given decision and the percentage was often impossible to deduce. The Commission had the possibility to adjust the fines on an *ad hoc* basis if the circumstances dictated,<sup>29</sup> and further it was not easy to glean why a party got off without a fine at all.<sup>30</sup> The Commission would invariably provide a long list of disparate factors in justifying the fine without giving reasons how these factors led to the fine such as: the geographic extent of the area affected by the anti-competitive conduct, the *modus operandi* of the parties privy to the anti-competitive agreements, the success of the illegal conduct, the economic importance of the sector, and its stability, to which the anti-competitive behaviour pertained, the importance of the product in question, the part played by each of the companies involved and the level of profit made by the company from the infringement. The obfuscation inherent in the calculation of the fines had been a major factor behind the challenges of the Commission decisions before the courts.<sup>31</sup> The courts themselves had lamented the lack of transparency inherent to the method used by the Commission at arriving at its final figure. In 1995, the CFI held that:

“it is desirable for undertakings – in order to be able to define their position in full knowledge of the facts – to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed on them, without being obliged, in order to do so, to bring court proceedings against the Commission decision - which would be contrary to the principle of good administration”.<sup>32</sup>

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<sup>24</sup> Luc Gyselen stated, for example that “obviously tariffication would seriously jeopardise the main objective of a fine. It would take away its deterrent effect. If companies knew in advance how much they have to pay they would operate a cost-benefit analysis with respect to the contemplated infringement.”, L. Gyselen, “The Commission’s Fining Policy in Competition Cases - ‘Questo è il catalogo’”, in P. Slot and A. McDonnell (eds.) *Procedure and Enforcement in EC and US Competition Law*, Sweet and Maxwell, 1993, p. 64.

<sup>25</sup> W.P.J. Wils, supra note 22, p. 257.

<sup>26</sup> See, for example, supra note 15, para. 66.

<sup>27</sup> I. Van Bael, supra note 1, p. 237.

<sup>28</sup> See supra note 15, para 64 where it is submitted that the absence of a mathematical formula is justified by the “complexity of the factors to be weighed that the assessment of fines, rather than being a mathematical exercise based on an abstract formula, involves a legal and economic appraisal in each case”.

<sup>29</sup> See supra note 15, para 139.

<sup>30</sup> See, for example, Commission decision of 21 December 1988, *Magill TV Guide/ITP, BBC and RTE*, (1989) O.J. L 78/43.

<sup>31</sup> See R. Richardson, “Guidance without Guidance – A European Revolution in Fining Policy? The Commission’s new Guidelines on Fines”, (1999) 20 *E.C.L.R.* 361.

<sup>32</sup> Judgments of the Court of First Instance in Cases T-148/89, *Tréfilunion v. Commission* [1995] E.C.R. II-1063, para. 142; T-147/189, *Société Métallurgique de Normandie v. Commission* [1995] E.C.R. II-1063 and T-151/89, *Société des Treillis et Panneaux Soudés v. Commission*, [1995] E.C.R. II-1063.

Though it may therefore have been “desirable” for undertakings to ascertain with precision the Commission’s method of calculation, it was only ever before the courts that the methodology employed by the Commission was brought to light. Prior to 1998, it was readily apparent that very few decisions imposing large fines escaped a challenge before the courts.<sup>33</sup> Extensive litigation did not, and does not, necessarily mean that the system is flawed, however, as parties to illegal conduct were, and are, increasingly of the view that they will receive a reduction in fines. It is of note also in this context that increased litigation is not necessarily the direct corollary of the Commission failing to assess the fines correctly. Undertakings appeal on a variety of substantive and procedural grounds.

### **III. Commission Fining Policy Post 1998**

In this part we assess the Commission’s fining policy subsequent to the adoption of the 1998 Guidelines. First, we examine, step-by step, the constituent elements of the 1998 Guidelines and give a critical analysis of it. Second, we look at the 1996 leniency notice and discuss its merits and drawbacks. Third, we evaluate the new 2002 leniency notice which supersedes the 1996 one. In this part we will also intermittently make reference to US fining policy.

#### **A. Content of the 1998 guidelines**

In response to these criticisms the Commission published the 1998 Guidelines on the method of setting fines,<sup>34</sup> which “embodi[es] a sea change in the Commission’s methodology for setting fines and a doctrinal shift of massive proportions”.<sup>35</sup> The 1998 Guidelines constitute an instrument intended to define, while complying with higher-ranking law, the criteria which it proposes to apply in the exercise of its discretion.<sup>36</sup> The preamble to the 1998 Guidelines expressly states that the principles incorporated in these Guidelines should ensure transparency and impartiality of the Commission’s decisions while maintaining the discretion bestowed upon the Commission through Regulation 17/62.<sup>37</sup> Indeed, the 1998 Guidelines are a manifestation of the fact that the Commission has uncoupled its reliance on turnover figures in order to set the fine.<sup>38</sup>

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<sup>33</sup> At the time, therefore, some commentators advanced the idea that the Court of First Instance should determine the fines, see F. Montag, “The Case for Radical Reform of the Infringement Procedure under Regulation 17”, (1996) 8 *E.C.L.R.* 435.

<sup>34</sup> Commission Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No. 17 and Article 65 (5) of the ECSC Treaty, (1998) O.J. C 9/3. See also in this respect the Guidelines on the method of setting fines pursuant to the EEA competition rules, (2003) O.J. C-10/14, which mirrors to a very large extent the Commission’s 1998 Guidelines.

<sup>35</sup> J. Joshua, “EC fining policy against cartels after the Lysine rulings: the subtle secrets of X”, (2004) *Global Competition Review* 5.

<sup>36</sup> The Commission has a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules, Judgment of the Court of First Instance, Case T-229/94, *Deutsche Bahn v. Commission*, [1997] E.C.R. II-1689.

<sup>37</sup> The XXVIIth Report on Competition Policy stated that “The publication of the guidelines is intended to improve the transparency and effectiveness of the Commission’s decision-taking practice. It is directed both at firms and their legal advisers and at the Communities’ judicial institutions. The application of the principles set out in the guidelines will also help to make the Commission’s policy on fines more coherent and to strengthen the deterrence of the financial penalties”, see XXVIIth Report on Competition Policy, European Commission, 1997, para 48.

<sup>38</sup> The 1998 Guidelines do not provide that fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover in the relevant market. However, nor do they preclude the Commission from taking either figure into account in determining the amount of the fine in order to ensure compliance with the general principles of Community law and where circumstances demand it, see Judgment of the Court of First Instance, Case T-23/99, *LR AF 1998 v. Commission*, [2002] E.C.R. II-1705, paras. 283 and 284.

The 1998 Guidelines lay down a number of factors for constructing the final amount of the fine.<sup>39</sup> Reaching the final fine involves a four step process. Step 1, in accordance with section 1 of the 1998 Guidelines, involves an assessment of the gravity and the duration of the infringement.<sup>40</sup> The “basic amount” of the fine is a conflation of the gravity of the infringements and its duration which are also the only criteria referred to in Article 15 (2) of Regulation 17/62 and Article 23 (3) of Regulation 1/2003 which supersedes Regulation 17/62. Three components delineate the gravity of the infringement in the Guidelines:<sup>41</sup> minor,<sup>42</sup> serious,<sup>43</sup> and very serious.<sup>44</sup>

Concerning gravity, for minor infringements the *likely* fine is to be between €1000 and €1 million, for serious infringements the *likely* fine is between €1 million and €20 million and for very serious infringements such as hard-core cartel activity, the *likely* fine is to be above €20 million.<sup>45</sup> The 1998 Guidelines stipulate that gravity is to be assessed by reference to the nature, the impact on the market and the size of the relevant geographic market.<sup>46</sup>

Where an infringement involves several players such as in cartel cases, the base amounts for each undertaking may vary according to “the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is a considerable disparity between the sizes of the undertakings committing infringements of the same type”.<sup>47</sup> Further, the Commission in its assessment of gravity takes account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers.<sup>48</sup> In this context, therefore, the Commission may group the different

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<sup>39</sup> The Commission enjoys a discretion enabling it to take account or not take account of certain factors when determining the amount of the fines which it intends to impose, having regard in particular to the circumstances of the case see Order of the Court of Justice of 25 March 1996 in Case C-137/95, *P SPO and Others v. Commission*, [1996] ECR I-1611, para. 54, Judgment of the European Court of Justice, Case C-219/95, *P Ferriere Nord v. Commission*, [1997] ECR I-4411 paras. 32 and 33, and *Limburgse Vinyl Maatschappij and Others v. Commission*, [2002] ECR I- 8375. The CFI further held that the Commission may not depart from guidelines which it has imposed on itself and which are intended to specify, in accordance with the Treaty, the criteria which it proposes to applying the exercise of its discretion in assessing the gravity of an infringement, Judgment of the Court of First Instance, Case T-7/89, *Hercules Chemicals v Commission*, [1991] E.C.R. II-1711, para. 53, confirmed on appeal in Case C-51/92, *P Hercules Chemicals v Commission*, [1999] E.C.R. I-4235.

<sup>40</sup> In principle every infringement of Article 81 EC should be penalised by a fine varying in accordance with its gravity and duration. However, if there is a novel set of circumstances, which the Commission has not addressed before, a company will receive a very low fine, see Commission decision of 10 December 2003, *Organic Peroxides*, not yet published in Official Journal but on Europa website, where AC Treuhand only received a fine of €1000.

<sup>41</sup> Section 1 A.

<sup>42</sup> The 1998 Guidelines state that a minor infringement entails, for example, a trade restriction, usually of a vertical nature but with a limited market impact and affecting only a substantial but relatively limited part of the Community market.

<sup>43</sup> The 1998 Guidelines state that a serious infringement usually entails horizontal or vertical trade restrictions but which are rigorously applied, with a reasonably wide market impact, and with effects in extensive areas of the Common Market. These might also be an abuse of a dominant position.

<sup>44</sup> The Guidelines state that a very serious infringement invariably entails horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly. Cartels therefore invariably fall into this category.

<sup>45</sup> “Likely fine” in this context concerns the final fine and does not refer to the “start amount”, J. Joshua, *supra* note 35, p. 6.

<sup>46</sup> Section 1 A of the 1998 Guidelines.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

enterprises according to their respective turnover, usually worldwide product turnover in cartel cases, so as to differentiate between these groupings when assessing the start amount for the individual undertakings.<sup>49</sup>

In addition, in the calculation of a given fine the Commission will set the fine at such a level (through a multiplier) that it has a sufficiently deterrent effect.<sup>50</sup> In this respect, the CFI has recently stated that:

“the fact that, in fixing such a multiplier, the Commission took into account the deterrent effect that fines must have, is wholly consistent with the established principle that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria has been drawn up. In that regard, the Commission’s power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Article 81(1) of the Treaty is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles”.<sup>51</sup>

The 1998 Guidelines further state that in the assessment of gravity, account must also be taken of the fact that large corporations should be aware of the state of the law and that their conduct could violate it.<sup>52</sup>

Having assessed the gravity of the infringement, an assessment of the duration of the infringement is undertaken in determining the basic amount of the fine.<sup>53</sup> This factor is also made up of three elements: short,<sup>54</sup> medium,<sup>55</sup> and long.<sup>56</sup> For short term infringements, the amount is not increased. For medium-term infringements of the law, the amount determined for gravity is ratcheted up by up to 50% and in cases of long duration, the amount determined for gravity is hiked up by 10% per year. With the introduction of the 1998 Guidelines the Commission has laid more emphasis on this criterion which stands in contrast to the situation

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<sup>49</sup> In *Citric Acid*, Commission decision of 5 December 2001, *Citric Acid*, (2002) O.J. L 239/18, for example, before the adjustment for deterrence was made, the appropriate starting amount of the fine, on the basis of the criterion of relative importance (using the worldwide product turnover of each undertaking) in the market concerned was as follows: Haarman & Reimer - €35 million; ADM, HLR and Jungbunzlauer - €21 million and Cerestar - €3.5 million. This individualisation of companies reflects the general principles of EC law such as the fairness/equitable and proportionality doctrines.

<sup>50</sup> In Commission decision of 21 October 1998, *Pre-insulated Pipes*, (1999) O.J. L 24/1, ABB, which systematically used its economic power and resources as a major multi-national company to reinforce the effectiveness of the cartel and to ensure that other undertakings complied with its wishes, received a minimum fine of ECU 20 million which is envisaged for a very serious infringement. The ECU fine of 20 million was subsequently weighted by 2, 5 for deterrence leading to a starting point of ECU 50 million.

<sup>51</sup> Judgment of the Court of First Instance, Case T-31/99, *ABB Asea Brown Boveri Ltd v. Commission*, E.C.R. [2002] II-1881.

<sup>52</sup> Within this context, in *TACA*, (Commission decision of 16.9.1998, *TACA*, (1999) O.J. L95/1), none of the parties benefited from a reduction in fines because of attenuating circumstances, as they had received legal advice not to include dual-rate prices in service contracts since dual rate pricing had been specifically prohibited in a previous decision.

<sup>53</sup> Section 1B of the 1998 Guidelines.

<sup>54</sup> Infringements of less than one year.

<sup>55</sup> Infringements lasting between one and five years

<sup>56</sup> Infringements lasting more than five years.

before 1998, when the Commission failed to distinguish between different durations of infringements when setting a fine.<sup>57</sup> It is notable that this novel emphasis on duration is intimately intertwined with the leniency notice, increasing incentives to “fink” on cartel co-conspirators and to co-operate with the Commission. As potential fines steadily increase the longer the illegal conduct occurs, cartel operators stand more to lose if they are not the first to apply for leniency. The Commission’s increased emphasis on the duration criterion therefore serves to bolster the incentive to take advantage of the leniency programme.<sup>58</sup>

Step 2, in accordance with sections 2 and 3 of the 1998 Guidelines, in the determination of the final amount of the fine consists in either reducing or increasing the basic amount with reference to any aggravating or mitigating circumstances. The list of factors which can be held as either aggravating or attenuating is not exhaustive but some examples for these two components are given. Aggravating circumstances encompass behaviour including recidivism, leading role, retaliatory measures against other undertakings, refusal to co-operate with or attempts to obstruct the Commission in carrying out its investigations and “other” (aggravating circumstances). Attenuating circumstances on the other hand include: passive role, non-implementation of offending agreement, termination of the infringement as soon as the Commission intervenes, existence of reasonable doubt on the part of the undertaking as to whether restrictive conduct does indeed constitute an infringement, effective co-operation outside the scope of the leniency notice and “other” (attenuating circumstances).

Step 3, in accordance with section 4 of the 1998 Guidelines, in determining the final amount will reflect whether any of the entities benefit from the leniency notice, which may reduce the fines or even lead to the non-imposition of fines. Step 4, in accordance with section 5 of the 1998 Guidelines, reserves the right to the Commission to adjust up or down the amount of fines to reflect that an undertaking manufactures a wide portfolio of products or to reflect the economic or financial benefit derived from the anti-competitive conduct or their ability to pay in a social context. Finally, during its step by step construction of the final fine the Commission must also bear in mind that it must stay within the confines of the statutory ceiling of 10% of the world-wide turnover of the undertaking in question.<sup>59</sup>

Wouter Wils has translated the various steps contained in the 1998 Guidelines for calculating fines in this simple formula:<sup>60</sup>

$$[x + y] \times [(100 + i - j) / 100] \times [(100 - k) / 100] = f.$$

X = amount determined for gravity, Y = amount determined for medium or long term duration, I = percentage figure reflecting any aggravating circumstances, J = percentage figure reflecting attenuating circumstances (other than co-operation under the notice of 18 July, 1996), K = a percentage figure reflecting the application of the 1996 leniency notice, F = final figure of the fine.

The following table, using the *Carbonless Paper* decision,<sup>61</sup> gives a working example of how the Commission uses the 1998 Guidelines to construct the final fine:

<sup>57</sup> See, for example, *Carton-board* and *Cement*, supra note 19.

<sup>58</sup> For a discussion on the Game Theory dynamic and its application to anti-trust leniency programmes see J.D. Medinger, “Anti-trust Leniency Programs: A Call for Increased Harmonisation as Proliferating Programs Undermine Deterrence”, (2003) 52 *Emory L.J.* 1439.

<sup>59</sup> In *Pre-insulated Pipes*, supra note 50, Tarco, Starpipe, Henss/Isoplus and Pan-Isovit received massive reductions (up to 80%) in fines that they would otherwise have received as the fine breached the 10% turnover ceiling of Regulation. 17. See also the case of MHTP in Commission decision of 20 December 2001, *Carbonless Paper*, (2004) O.J. L 115/1.

<sup>60</sup> W.P.J. Wils, supra note 22, p. 252, footnotes 20 and 21.

Table 1

Name of Company	Starting Amount €mill.	Increase for Duration €mill.	Agg. Circum.	Mit. Circum.	Turnover cap (10%)	Application of the leniency notice '96	Total €mill.
<b>AWA</b>	140 (70 for gravity increased by 100% for deterrence to take account of its size and resources)	189 + 35%	283.5 (50% increase for being the ringleader)	N/A	N/A	184.27 - Reduction of 35% for voluntarily submitting information on cartel meetings	184.27
<b>MHTP</b>	24.5	33.075 + 35 %	N/A	N/A	23.6	21.24 - Reduction of 10% for not contesting the facts after receiving statement of objections	21.24
<b>Zanders</b>	24.5	33.075 + 35%	N/A	N/A	N/A	29.76 - Reduction of 10% for not contesting the facts after receiving statement of objections	29.76
<b>Koehler</b>	24.5	33.075 + 35%	N/A	N/A	N/A	N/A	33.075
<b>Torras-papel</b>	10.5	14.175 + 35 %	N/A	N/A	N/A	N/A	14.175
<b>Bolloré</b>	21 (10.5 for gravity increased by 100% for deterrence to take account of its size and resources)	28.35 + 35 %	N/A	N/A	N/A	22.68 - Reduction of 20% for admitting that an executive had attended two or three cartel meetings	22.68
<b>Sappi</b>	11.2 (5.6 for gravity increased by 100% for deterrence to take account of its size and resources)	15.12 + 35%	N/A	N/A	N/A	0 - 100% reduction for satisfying the conditions of immunity under section B of the leniency notice	0.0
<b>Mougeot</b>	5.6	7.28 + 30%	N/A	N/A	N/A	3.64 - Reduction of 50% for providing statements and documents on cartel meetings	3.64
<b>Divipa</b>	1.4	1.75 + 25%	N/A	N/A	N/A	N/A	1.75
<b>Zicunaga</b>	1.4	1.54 + 10%	N/A	N/A	N/A	N/A	1.54
<b>Carrs</b>	1.4	0.35 + 25%	N/A	N/A	N/A	1.57 - Reduction of 10% for not contesting the facts after receiving statement of objections	1.57

## B. Criticism of the 1998 Guidelines

The enforcement of EC competition law necessarily involves an element of flexibility. Indeed, the analysis of an EC competition law violation turns on the particular, and sometimes complicated, facts in hand. With EC competition law violations therefore being polymorphous, the 1998 Guidelines must allow the Commission a degree of latitude when setting fines. It is not a simple task for the Commission either to pigeon-hole every factual scenario into one of the one of the three categories concerning gravity or to ascertain precisely whether there are, for example, any aggravating or attenuating circumstances and to what extent these should be taken into consideration. What is of importance, however, is that the Commission decisions are coherent, thereby providing legal certainty.

<sup>61</sup> See supra note 59.

The Commission's 1998 Guidelines can, nonetheless, be criticised on a number of points. Against the backdrop of the preamble to the 1998 Guidelines which states that "the principles outlined here should ensure the transparency and impartiality of the Commission's decisions in the eyes of the undertakings and of the Court of Justice alike [...]", the 1998 Guidelines are linguistically vague, which both leaves undertakings unable to ascertain where their behaviour falls in the 1998 Guidelines and arouses the suspicion that the Commission is attempting to maintain its discretion.<sup>62</sup> Examples of vagueness abound with phrases such as "generally speaking", "might be" and "likely fines" dotted throughout the 1998 Guidelines. Further, the word "other" (aggravating or mitigating circumstances) is found in sections 2 and 3 of the 1998 Guidelines, highlighting the discretion which the Commission has bestowed upon itself.

Different start amounts are given for the same anti-competitive infringements. This is especially apparent in the case of abuses of a dominant position (see below). Similarly, when assessing any redeeming virtues in the form of mitigating circumstances, the Commission also fails to impose fines coherently as is witnessed in *Greek Ferries* and *Luxemburg Brewers* where the existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement was treated differently.<sup>63</sup> In addition, the 1998 Guidelines only give a very rough indication as to how the calculation for the start amount (the lump sum figure used as a point of reference for later adjustments) is to be undertaken with no indication of an economic test which is to be applied when assessing the gravity of the infringement.<sup>64</sup> In *Seamless Steel Tubes*, for example, the Commission rather laconically states:

"the observance of domestic markets constitutes, in principle, a very serious infringement of Community law, since it jeopardises the proper functioning of the single market. Aware that their actions were unlawful, the producers agreed to introduce a secret, institutionalised system designed to restrict competition in an important industrial sector. Furthermore, the four Member States in question account for most of the consumption of seamless OCTG and pipe line in the Community and therefore constitute an extended geographic market [...] the infringement must be considered a very serious one. However the Commission takes into account the fact that the sales of the products in question by the firms to which this decision is addressed amount only to about 73 million a year. [The fine should be fixed at €10 million]".<sup>65</sup>

There is no explanation therefore how the Commission reached the sum of €10 million. Reading the decisions in general, one may come to the conclusion that the start amount is to a considerable extent chosen arbitrarily and at random. Here, it is to be remembered that the *likely* fines found in the 1998 Guidelines are indications of the overall fine and not the start amount. This therefore being a matter for conjecture, the start amount is possibly established largely by reference to the global turnover on the market for the product concerned.<sup>66</sup> Such

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<sup>62</sup> R. Richardson, *supra* note 31, p.365.

<sup>63</sup> Commission decision of 9 December 1998, *Greek Ferries*, (1999) O.J. L 109/24, para 163 and Commission decision of 5 December, *Luxemburg Brewers*, (2002) O.J. L 253/21, para. 100.

<sup>64</sup> The Guidelines state "In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market".

<sup>65</sup> Commission decision of 8 December 1999, *Seamless Steel Tubes*, (2003) O.J. L 140/1, para. 161.

<sup>66</sup> J.F. Bellis "La Détermination des Amendes pour Infraction au Droit Communautaire de la Concurrence - Bilan de Cinq années d'application des Lignes Directrices de 1998", (2003) 3-4 *Cahiers de Droit Européen* 377.

laconic conclusions by the Commission will only give impetus to increased litigation before the Courts.

Further, though heralded as “an opportunity to clarify the criteria for fixing the amount of fines”,<sup>67</sup> the *Lysine* judgments seem to shed only limited light on how the Commission is to arrive at the start amount.<sup>68</sup> Indeed, the CFI seems to play the role of “Guardian of the Guidelines” ensuring that the Commission follows the self-imposed restriction imposed on it in the form of the 1998 Guidelines.<sup>69</sup> This observation is manifestly evidenced by the fact that in *Amino Acids*,<sup>70</sup> while assessing the gravity of the infringement, the Commission relied on worldwide turnover, without taking into consideration the turnover in the market affected by the infringement, the EEA lysine market.<sup>71</sup> The CFI in the *Archer Daniels Midland* judgment, following the *Amino Acids* decision,<sup>72</sup> held that the 1998 Guidelines do not prevent the Commission from taking into account either worldwide turnover of the undertaking which gives an indication, albeit approximate and imperfect, of the size of the undertaking and its economic power *or* turnover in the relevant market to which the infringement pertains, which gives an indication of the scale of the infringement. The CFI held, however, that the Commission had, by only taking worldwide turnover into account disregarded the fourth and sixth paragraphs of Section 1 A of the 1998 Guidelines.<sup>73</sup> This was held to be only a minor error, the Commission’s assessment of gravity therefore not breaching the principle of proportionality. The lack of assessment by the CFI of the principle behind which turnover should be taken into account, however, will only lead to further litigation before the CFI and at some point the CFI will have to analyse this issue.<sup>74</sup>

The raft of decisions finding themselves before the courts since the introduction of the 1998 Guidelines certainly reflects to a certain degree that the Commission’s methodology in calculating the fine fails to solve the problems identified before 1998. On the other hand, however, the CFI has never increased a fine imposed by the Commission (see below).<sup>75</sup> Many undertakings therefore feel they have nothing to lose by going to the CFI to seek a reduced

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<sup>67</sup> See CFI Press release N1 58/03 of 9 July 2003 “A Cartel on the Lysine Market gives the Court of First Instance an Opportunity to Clarify the Criteria for Fixing the Amount of the Fines”.

<sup>68</sup> Judgment of the European Court of First Instance, Case T-223/00, *Cheil Jedang Corp v. Commission*, [2003] E.C.R. II-2473; Judgment of the European Court of First Instance, Judgment of the European Court of First Instance, Case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission*, [2003] E.C.R. II-2597, Judgment of the European Court of First Instance, Case T- 230/00, *Daesang Corp and Sewon Europe GmbH v. Commission*, [2003] E.C.R. II-2733.

<sup>69</sup> See J. Joshua, *supra* note 35, p. 6.

<sup>70</sup> Commission decision of 7 June 2000, *Amino Acids*, (2001) O.J. L 152/24.

<sup>71</sup> The Commission in the *Amino Acids* did not specify in what market the worldwide turnover was to be taken into account. It was only before the CFI that it came to light that the Commission had taken account of not only the total turnover of the undertakings concerned, that is to say turnover from all the activities carried out, but also the worldwide turnover in the lysine market.

<sup>72</sup> *Archer Daniels Midland v. Commission*, *supra* note 68.

<sup>73</sup> *Id.* para. 197.

<sup>74</sup> The taking of world-wide product turnover into account is deemed not always relevant when an international cartel involves price-fixing rather than market sharing. In such a case the turnover in the product market affected by the infringement in Europe would be a more reliable indicator to assess the effect on the European market, see J.F. Bellis, *supra* note 66, p. 379.

<sup>75</sup> Courts at national level have, however, increased fines imposed on undertakings by the national competition authority. For example, on 11 January 2005, the Paris Court of Appeal, for the first time, increased a fine meted out by the national competition authority. It doubled the €20 million fine levied on France Telekom by the national competition authority for failing to respect an injunction imposed on it, see Council decision 04-D-18 of 13 May 2004. This therefore signals that undertakings in France are no longer able to go before the courts with the blind expectation that they will, at worst, have the fine re-affirmed.

fine. Similarly, as mentioned, above, undertakings go before the courts for a number of substantive and procedural grounds.

In 1998, the Commission recognised itself that the 1998 Guidelines could be improved upon by stating that “after a record year for fines, the Commission is considering reviewing in the light of the experience gained, some of the provisions of the Guidelines on setting fines so as to correct certain aspects deemed not to accord with objectives pursued”.<sup>76</sup> These seem to be empty words as no revised guidelines have appeared yet.

#### D. Content of the 1996 Leniency Notice

As mentioned above, step 3 in the calculation of the final fine involves an assessment of whether any undertaking is able to take advantage of the leniency programme. The rationale behind a system of leniency stems from the clandestine nature of cartels, the corollary being that they are difficult to detect. Indeed, both the 1996 and 2002 leniency notices only apply to secret cartels between enterprises aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports. As a result of the fact that the new leniency notice only came into force in 2002,<sup>77</sup> which supplants the 1996 leniency notice,<sup>78</sup> the analysis of the Commission decisions and CFI judgments in this paper will focus on the 1996 leniency notice. The new 2002 leniency notice has been applied but the Commission is still in discussion with the parties on the identification of potential business secrets and other confidential information to be removed from published versions of the decisions in question. It is therefore pertinent to elucidate the requirements of the 1996 leniency notice, which has been applied on 23 occasions since the introduction of the 1998 Guidelines, that cartel members had to fulfil in order to receive lenient treatment.

The extent to which an enterprise received lenient treatment under the old notice depended on which conditions of the leniency notice it had fulfilled. The 1996 leniency notice was comprised of three sections (B,C, and D), each setting out the extent of a reduction in fines an undertaking could legitimately expect to receive depending on which conditions of the 1996 leniency notice were fulfilled.

In order to receive no fine or a very substantial reduction in its amount under section B of the 1996 notice, the cartel member in question had to fulfil the following cumulative conditions: (a) inform the Commission about a secret cartel before the Commission had commenced an investigation ordered by decision, of the companies involved provided that it was not already in the possession of sufficient information to establish the existence of the alleged cartel, (b) be the first to furnish the Commission with decisive evidence of the cartel’s existence, (c) cease its involvement in the illegal activity no later than the time at which it discloses the cartel, (d) provide the Commission with all the relevant information and all documents and evidence available to it regarding the cartel and maintain continuous and complete cooperation throughout the investigation, and finally (e) not have compelled another enterprise to take part in the cartel nor acted as an instigator or played a determining role in the illegal activity.<sup>79</sup> Undertakings fulfilling these conditions could legitimately expect a reduction in fines between 75 and 100%.

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<sup>76</sup> See XXVIIIth Report on Competition Policy, European Commission, 1998, para. 344.

<sup>77</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases, (2002) O.J. C-45/3

<sup>78</sup> Commission Notice of on the non-imposition or reduction of fines in cartel cases, (1996) O.J. C-207/04.

<sup>79</sup> For example in *Amino Acids*, supra note 70, Ajinomoto, as instigator of the cartel, received only a 50% reduction even though it was the first to come forward and give decisive evidence to the Commission before it

In order for a firm to receive a substantial reduction in a fine under section C of the 1996 notice, the firm coming forward for leniency had to fulfil conditions (b)-(e) above and expose the secret cartel after the Commission had undertaken an investigation ordered by decision on the premises of the parties to the cartel, which failed to provide sufficient grounds for initiating the procedure leading to a decision.

An enterprise could also still find reprieve under section D of the 1996 notice and benefit from a 10-50% reduction in fines. Empirical evidence shows that when a co-conspirator did fink on another member, the cooperation invariably only deserved to fall within the scope of section D.<sup>80</sup> The company only had to co-operate with the Commission. Section D gave two examples of co-operation: (1) before a statement of objections was sent, an enterprise provided the Commission with such information, documents or other evidence which materially contributed to establishing the existence of the infringement,<sup>81</sup> and (2) after having received the statement of objections, the enterprise informed the Commission that it does not substantially contest the facts on which the Commission based its allegations. The timing of the co-operation and the value of the evidence provided also played a pivotal role in determining the level of the fines levied.

#### E. Criticism of the 1996 leniency notice

The requirement that the company had to be the first comer, had the benefit of fostering uncertainty and mistrust within a cartel, yet this benefit was eroded in that even if an enterprise was the first to blow the whistle, there was no guarantee of immunity, the grant of immunity lying within the discretion of the Commission. Further, leniency applicants would only find out at the end of proceedings, when the decision was given, whether they would be granted immunity or not, exacerbating the legal uncertainty of the leniency programme. In order for an enterprise to receive the full benefit under section B, it had to demonstrate the existence of a cartel before the Commission had commenced its investigation. The effect of the 1996 notice meant that industries, which have traditionally been under surveillance for cartel activity were precluded from ever receiving immunity or a very substantial reduction in fines.<sup>82</sup> The requirement that a company in order to benefit from sections B and C, had to furnish the Commission with new and decisive evidence also worked as a disincentive to apply for leniency. A company could never know whether the information it wished to provide was “new” and “decisive”. The provision of decisive evidence by a company meant that documentary evidence had to be handed over to the Commission. This is not always simple given that in cartel cases documents are often put through the shredder. Applicants that wished to gain “first comer” status and therefore immunity would as a result submit hastily

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had undertaken an investigation ordered by decision. It is also to be noted that it did not provide the Commission with all the relevant evidence as it had destroyed some of it.

<sup>80</sup> The fact that in most decisions section D was applied underlines the weaknesses of the old notice. It demonstrates that firms only came forward with information when they felt cornered, see F. Arbault and F. Peiro, “The Commission’s New Notice on Immunity and Reduction of Fines in Cartel Cases: Building on Success”, (2002) 2 *Competition Policy Newsletter* 18

<sup>81</sup> In Judgment of the European Court of First Instance, Case T-31/99, *ABB Asea Brown Boveri v. Commission*, [2002] E.C.R. II-1881, it was stated that “it was perfectly admissible for the Commission not to grant the maximum reduction envisaged by Section D to the applicant, which did not declare its willingness to cooperate until after receiving a first request for information”, para. 238.

<sup>82</sup> J. Carle, S.P. Lindeborg and E. Segenmark, “The New Leniency Notice”, (2002) 23 *E.C.L.R.* 266.

prepared company statements that did not accurately show the extent of the cartel activity, and were not as inter-active an in-personal presentation with questions and answers could be.<sup>83</sup>

From a conceptual point of view, section B (e) seemed nebulous and uncertain. The terms “instigator” and “determining role” are subjective and potentially overbroad. If two competitors, for example, agree to fix prices, both could be potentially disqualified under the 1996 notice. The company that made contact with a competitor to fix prices would be an “instigator” and the other competitor would have played a “determining role”.<sup>84</sup> The Commission has noted itself “experience to date has shown that the notion of “instigator” is somewhat vague (it is rarely clear cut if and who the instigator of a cartel is: who is a leader of a cartel of two or three? How many leaders can you have?) This has to a certain extent jeopardised the effectiveness of the programme”.<sup>85</sup> The vagueness and legal uncertainty embedded in the 1996 notice explained why the notice was not as effective as, for example, the US corporate amnesty programme,<sup>86</sup> which receives on average two applications per month.<sup>87</sup>

#### F. The 2002 EC leniency notice

In the preamble to the new notice, the Commission stated that it wished to enhance the transparency and certainty of the conditions on which any reduction in fines will be granted. The Commission intends to increase the effectiveness of the leniency notice by aligning more closely the level of the reduction of fines and the value of a firm’s contribution to establishing the infringement.<sup>88</sup> More importantly, the Commission committed itself to guaranteeing immunity from fines if the requisite conditions were fulfilled. Indeed, it would seem that with the entry into force of the new leniency programme there has been an exponential increase in leniency applications.<sup>89</sup> The new 2002 notice tacitly implies that the 1996 notice was not as effective as it could have been.

The 2002 leniency notice is comprised of two sections (A and B), each setting out the extent of a reduction in fines an undertaking could legitimately expect to receive depending on which conditions of the 2002 leniency notice were fulfilled.<sup>90</sup> The Commission will guarantee

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<sup>83</sup> D. Jarret Arp and C.R.A. Swaak, “A Tempting Offer: Immunity from Fines for Cartel Conduct under the European Commission’s New Leniency Notice”, (2003) 24 *E.C.L.R.* 13. Some commentators have voiced concerns about the credibility of information provided by leniency applicants and about the possibility of fabricating evidence in order to receive lenient treatment, see W. Fiscoetter and H. Wrage-Molkenthin, “Brauchen wir eine Kronzeugenregulierung im deutschen Kartellrecht” in E. Niederleithinger, R. Werner und G. Wiedemann (eds), *Festschrift für Otfried Lieberknecht zum 70 Geburtstag*, XIII Edition, Munich, 1997, p. 326.

<sup>84</sup> D. Jarret Arp and C.R.A. Swaak, Id., p. 13.

<sup>85</sup> “Question and Answer on the Leniency Policy”, Memo/02/23, European Commission, Brussels, 2000.

<sup>86</sup> US Department of Justice, Corporate Leniency Policy (1993).

<sup>87</sup> G. Spratling, Deputy Assistant Attorney General, US Department of Justice, Antitrust Division, “Making companies an offer they should not refuse”, 1999 at <http://www.usdoj.gov/atr/public/speeches/2247.htm>. Between October 2002 and March 2003 amnesty applications in the US jumped to three per month which represents an all time high, see the American Bar Association Meeting “The Modern Leniency Program after ten years- A Summary overview of the Antitrust Division’s Criminal Enforcement Program”, 12 August 2003.

<sup>88</sup> Under the 1996 leniency notice, where there was no clear alignment between the reduction in fines and the value of information. Experts often predicted reductions, which were a few 100% away from the actual reduction, M. Klusmann, “Internationale Kartelle und das Europäische Leniency Programm aus Sicht der Verteidigung-Kritik nach fünf Jahren Anwendungspraxis”, (2001) 9 *Wirtschaft und Wettbewerb* 825

<sup>89</sup> The XXXIIIrd Report on Competition Policy, European Commission, 2003, stated that “the Commission has received 34 applications for immunity dealing with at least 30 separate alleged infringements”, see para. 30.

<sup>90</sup> For a full and comprehensive discussion on the new leniency notice see B. van Barlingen, “A View from the Inside: The European Commission’s 2002 Leniency Notice after One Year of Operation”, (2003)17-*SPG*

complete immunity from fines under section A to the first company, which provides the Commission with such evidence that allows it to launch a dawn raid investigation in connection with an alleged cartel affecting the Community (point 8 a) *or* that will enable it to find a cartel infringement in connection with an alleged cartel affecting the Community (point 8b).<sup>91</sup> In order for immunity to be granted under point 8 (a), the Commission must not have sufficient evidence to launch a dawn raid investigation. In order for immunity to be granted under point 8 (b), the Commission must not have had sufficient evidence to find a cartel infringement and that no company had been granted conditional immunity from fines under point 8 (a). The following conditions must also be met: A company must co-operate fully, continuously and expeditiously with the Commission throughout the Commission's administrative procedure and provide the Commission with all the evidence that comes into its possession (point 11 (a), end the infringement immediately (point 11 (b)) and not have coerced other companies to take part in the cartel (point 11 (c)).<sup>92</sup>

If a company does not fulfil the conditions for immunity, it can receive a reduction in fines under section B if it gives evidence, which represents "significant added value" to the evidence already in the Commission's possession. The company must also immediately end its involvement in the cartel (point 21). The first company to fulfil these conditions will receive a 30-50% reduction in fines. The second company to fulfil these conditions will receive a 20-30% reduction in fines, and subsequent companies will receive a reduction in fines of up to 20% (point 23 (b)). In order to determine the level of reduction within each band, the Commission will take into account the time at which the evidence was submitted in order to satisfy the "significant added value" test and the extent to which it represents "added value". The extent and continuity of any co-operation will also be taken into account.

The fact that there is guaranteed immunity from fines leads to greater transparency and legal certainty and is therefore a massive improvement. One innovation under the new notice is that if a company fulfils the conditions for immunity from fines, it will be granted conditional immunity from fines in writing (point 15) and the Commission will not consider other immunity applications with regards to the same infringement until it has taken a position on an existing application (point 18).<sup>93</sup> Regarding section B, applicants for non-immunity are assured that a definite range of percentage reduction will be given depending on how swiftly the evidence is handed over to the Commission and how valuable it is. The Commission has committed itself to aligning the level of fines with the value of a company's contribution to establishing an infringement.<sup>94</sup> If an undertaking provides evidence concerning facts

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*Antitrust* 84 and N. Levy and R. O'Donoghue, "The EU Leniency Programme Comes of Age", (2004) 27 *World Competition* 76.

<sup>91</sup> Entaco in the Needles cartel recently received full immunity under point 8(a) as it came forward and disclosed information which enabled the Commission to take this decision, See Commission Press Release, IP/04/1313 of 26 October 2004, "Commission fines Coats and Prym for a cartel in the needle market and other haberdashery products".

<sup>92</sup> A potential problem has been identified with the concept of "coercion". A company could strongly persuade other firms to take part in a cartel without actually coercing them, and then turn around and blow the whistle on these firms, inflicting damage on them. It is submitted that a leniency programme should never protect or reward such behaviour, A. Klees "Zu viel Rechtssicherheit für Unternehmen durch die neue Kronzeugenmitteilung im europäischen Kartellverfahren?" 11 *Wirtschaft und Wettbewerb* 1067.

<sup>93</sup> The XXXIIIrd Report on Competition Policy, European Commission, 2003 stated that by the end of 2003, conditional immunity had been granted in 27 cases, para 30.

<sup>94</sup> The Commission's policy has been criticised however, as it places much more importance on the finishing order of the applicant than the quality of the evidence furnished as an applicant company in third place will receive no more than a 20% reduction in fines even if it establishes the case for the Commission, see J. Joshua

previously unknown to the Commission, which have a direct bearing on the gravity or duration of the cartel, the Commission will not take these elements into account when setting any fine on an undertaking, which provided this evidence (point 21(b)). This provision constitutes an attractive carrot to those cartels, which could be regarded as particularly pernicious.

The new notice has got rid of subjective elements such as the concept of instigator or determining role.<sup>95</sup> Instead a company, which seeks total immunity must not “take steps to coerce other undertakings to participate in the infringement”. This has to a certain extent enhanced certainty. Nevertheless, it remains to be seen how coercion will be interpreted.<sup>96</sup> The new notice also seems to be more flexible in the evidence that is required. The decisive evidence requirement of sections B and C of the 1996 notice in conjunction with the Commission’s practice under the old notice of demanding that the “decisive evidence” requirement be in documentary form, meant that it created great difficulties for a firm to come forward unless it has “smoking gun” evidence of a cartel.<sup>97</sup> The new requirement, although still subjective, states that the applicant must be the first to “submit evidence which in the Commission’s view may enable “it to launch a “dawn raid investigation” or find an infringement of Article 81 EC. There is increased flexibility as even if there is insufficient information to establish an infringement, a company can still receive immunity if it provides sufficient evidence for the Commission to launch a dawn raid investigation. There is therefore less of an evidentiary hurdle to climb for the applicant. In addition, in the context of evidence, the Commission now fully endorses a paperless, and therefore oral, leniency procedure, negating the pitfalls associated with the obligatory production of documentary evidence especially in cartel cases. One of the greatest strengths is the fact that the new notice provides for the opportunity to receive full immunity after the Commission has commenced an investigation. According to United States Department of Justice officials, approximately one half of all immunity applications are made after the beginning of an investigation in the US.<sup>98</sup>

#### **IV. Review of the Commission Decisions imposing Fines**

In this part, we analyse the published Commission decisions concerning fines for transgressions of Articles 81 and 82 EC since 1998.<sup>99</sup> We begin assessing how the Commission assesses the components of gravity, duration and deterrence when constructing a fine. Next we examine any mitigating or aggravating circumstances which are taken into account by the Commission. Finally we look at how the 1996 leniency programme has been applied as we only have very limited information on the application of the 2002 leniency

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and P.D. Camesasca, “Where Angels Fear to Tread: the Commission’s new Leniency Policy Revisited”, (2005) *The European Antitrust Review* 11.

<sup>95</sup> It is stated by some commentators that total immunity for the instigator of a cartel (which is possible under the new notice) cannot be justified, see A. Klees, *supra* note 92, p. 1067.

<sup>96</sup> A potential problem with this provision has been identified. A company could strongly persuade other firms to take part in a cartel without actually coercing them and then turn around and blow the whistle on these other firms inflicting damage on them. It is stated that a leniency programme should never reward such behaviour, *supra* note 92, p. 1068.

<sup>97</sup> D.J. Arp and C.R.A. Swaak, *supra* note 83, p. 14.

<sup>98</sup> The Observations and Comments of the American Bar Association of Antitrust Law and Section of International Law and Practice on the Draft Commission Notice on Immunity from Fines and reduction of Fines in cartel Cases, American Bar Association, 2001, p. 3.

<sup>99</sup> We generally use published decisions as the Commission Press Releases are for the most part too vague to give a precise analysis of the factors taken into account in the construction of the final fine. Where the Press Releases do give a sufficiently precise analysis then we will also use them.

notice. The analysis of the abovementioned factors will be carried out through the use of pertinent examples.

#### A. General overview of the level of fines imposed by the Commission

Since the introduction of the 1998 Guidelines the Commission has levied fines on 61 occasions for infringements of Articles 81 and 82 EC to date.<sup>100</sup> The first observation one can make is that there is an upward trend in Commission fines. This upward trend is not only found in the case of cartels, however. An increasingly heavy-handed approach is also being witnessed within the sphere of other types of Article 81 EC infringements and Article 82 EC infringements.<sup>101</sup> The escalation in fines gives an indication that the EC is just as tough in its stance towards EC competition law infringements as the US antitrust authorities are.<sup>102</sup> Between 1969 (when the first cartel decision was rendered) and 2001, the Commission adopted 57 decisions against cartels with the total amount of fines reaching €3.3 billion. In the time frame between the adoption of the first leniency notice in 1996 and 2001, the Commission adopted 24 decisions involving 60 firms. Fines in this period reached €2.8 billion. Nearly €1.8 billion in fines was levied on cartels in 2001 alone.<sup>103</sup> The average fine imposed on cartels between 1998 and 2004 is €110 million. This level of fining can be partly explained by the adoption of the *Vitamins* decision as in this particular case fines of €855 million were imposed on this single cartel,<sup>104</sup> over twice as high as the fines imposed in the next highest fining decision of the same year, namely *Carbonless Paper*.<sup>105</sup> Even if one removes the *Vitamins* decision the average fine in the EC for cartels is high, constituting over €90 million.

The following graph sets out the amount of fines imposed by the Commission between 1998 and 2004. For sake of clarity the number of Article 81/82 EC decisions involving fines taken by the Commission and the concomitant fines in each respective year are: 1998 - 7 decisions - €559.090.000; 1999 - 4 decisions - €111.351.000; 2000 - 8 decisions - €232.607.000; 2001- 15 decisions - €1.857.814.000; 2002 – 10 decisions - €1.128.341.000; 2003 – 9 decisions - €563.058.000; 2004 - 8 decisions - €864.026.000.

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<sup>100</sup> We analyse the Commission decisions rendered between 1998 and the end of 2004.

<sup>101</sup> See for example the *Volkswagen* (Commission decision of 28 January 1998, *Volkswagen*, (1998) O.J. L 124/60.) and *Nintendo* (Commission decision of 30 October 2002, *Nintendo/Video Games*, (2003) O.J. L 253/33.) decisions concerning anti-competitive distribution agreements where the parties were fined €102 million and €168 million respectively. See also and the *TACA* (Commission decision of 16.9.1998, *TACA*, (1999) O.J. L95/1.) and *Microsoft*, see supra note 4, decisions involving an abuse of a dominant position where the parties were fined €273 million and €497 million respectively.

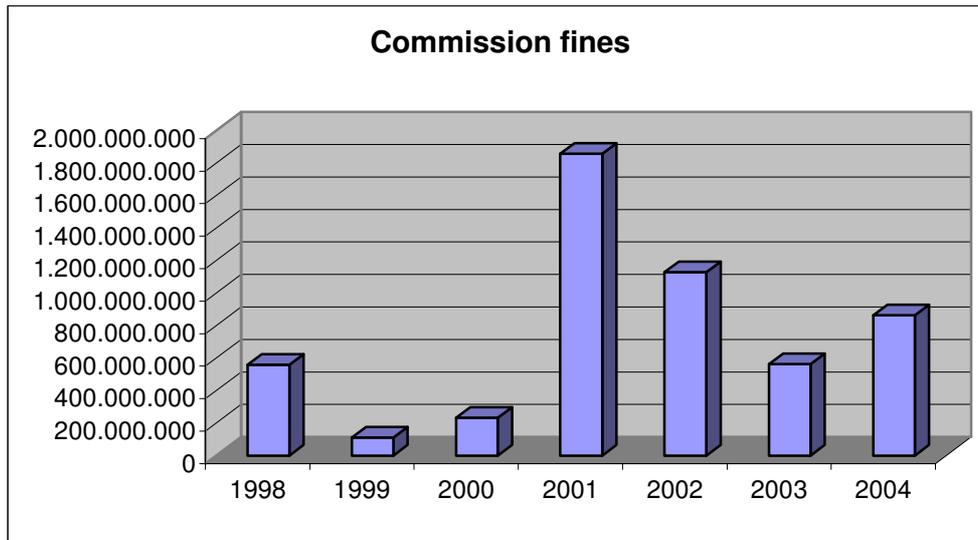
<sup>102</sup> For example the US fine in *Amino Acids* was \$92 million and in the EU the fine was €110 million. Similarly, the US fine in the *Vitamins* was \$911 million and in the EU €855 million.

<sup>103</sup> M. Monti, supra note 1.

<sup>104</sup> Commission decision of 21 November 2001, *Vitamins*, (2003) O.J. L 6/1.

<sup>105</sup> See supra note 59.

Graph 1



Empirical evidence demonstrates that there have been far less fining decisions for abuses of a dominant position under Article 82 EC (10 thus far) than under Article 81 EC (51 thus far) since the introduction of the 1998 Guidelines. Fines also tend to be lower for Article 82 cases than infringements of Article 81, especially cartel cases.<sup>106</sup> This is to some extent justified by the fact that the concept of abuse of a dominant position is an objective concept while cartel behaviour will always involve an element of intent.<sup>107</sup> Further, cartels involve a number of players. In a similar fashion to *Vitamins* in 2001, the *Microsoft* decision in 2004,<sup>108</sup> where a €497 million fine was meted out for an abuse of a dominant position, fudges the harshness of the Commission's general fining policy with regard to breaches of Article 82 EC. The next highest fine for an abuse of a dominant position is €273 million in *TACA* in 1998.<sup>109</sup> More often than not, however, fines for breaches of Article 82 have been below the €25 million threshold.

The following graph demonstrates in each given year the fines imposed by the Commission between 1998 and 2004. For sake of clarity the number of decisions concerning Article 82 and Article 81 are as follows: **Article 81:** 1998 – 5 decisions - €280.110.000;<sup>110</sup> 1999 – 2 decisions - €111.544.000; 2000 – 6 decisions - €202.607.000; 2001 – 11 decisions - €1.811.553.000; 2002 – 10 decisions - €1.128.341.000;<sup>111</sup> 2003 – 7 decisions - €540.108.000;

<sup>106</sup> Article 81 infringements which contain elements where the Common Market imperative has been threatened tend to attract high fines.

<sup>107</sup> “The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which, [...] through recourse of methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”, Judgment of the European Court of Justice, Case 85/76 Hoffman La Roche [1979] E.C.R. 461.

<sup>108</sup> Commission decision of 24 March 2004, *Microsoft*, supra note 4.

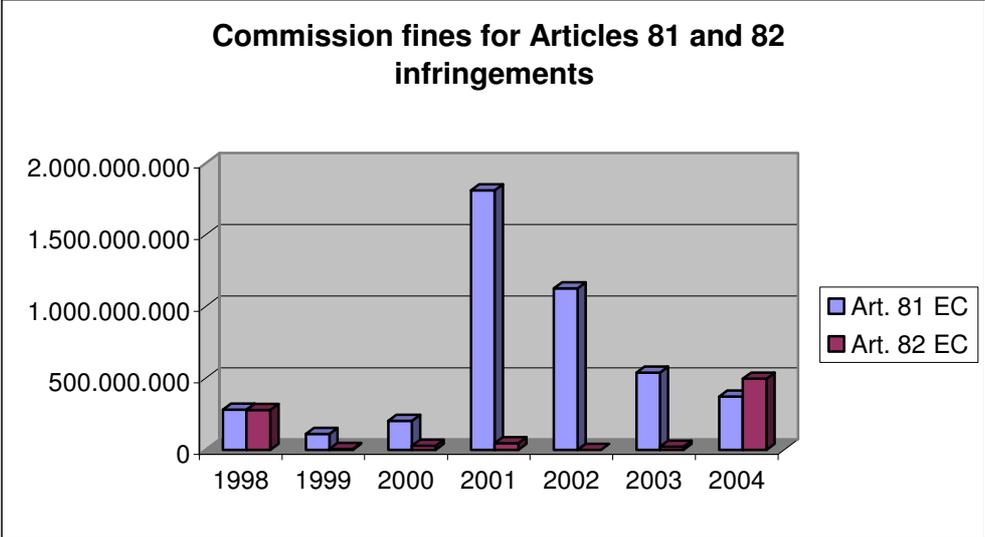
<sup>109</sup> Commission decision of 16.9.1998, *TACA*, supra note 101.

<sup>110</sup> The fines in one of these decisions in 1998 (Commission decision of 21 January 1998, *Alloy Surcharge*, (1998) O.J. L 100), were imposed under Article 65 ECSC Treaty, the provisions of which closely resemble Article 81 EC.

<sup>111</sup> The fines in one of these decisions in 2002 (*Italian Concrete Bars*, see Commission Press Release IP/02/1908 of 17 December 2002, “Commission fines eight firms for taking part in a concrete reinforcing bar cartel in Italy”) were imposed also under Article 65 ECSC Treaty.

2004 – 7 decisions - €372.830.000. **Article 82:** 1998 - 2 decisions - €278.980.000; 1999 - 2 decisions - €6.801.000; 2000 - 2 decisions - €30.000.000; 2001 - 4 decisions - €46.260.000; 2002 - 0 decisions; 2003 - 2 decisions - €22.950.000; 2004 – 1 decision - €497.196.304.

Graph 2



B. Detailed analysis of the parameters taken into account by the Commission in its determination of fines

In this section, we provide the results of our extensive analysis of the decisions of the Commission since 1998, which aims at identifying the various parameters taken into account by the Commission in its assessment of the level of fines. The following table contains several columns, which successively indicate: (i) the name of the decision, (ii) the amount of the fine imposed by the Commission; (iii) whether the Commission considered that the infringements in question were of minor, severe or very severe gravity; (iv) whether these infringements were of short, medium or long duration; (v) the aggravating circumstances identified by the Commission in its decisions; (vi) the mitigating circumstances taken into account by the Commission; whether the Commission went up to the 10% turnover cap provided first in Regulation 17/62 and now in Regulation 1/2003; and (vii) whether the fines were reduced under section B,C or D of the 1996 leniency notice or under section A or B of the 2002 leniency notice.





**Aggravating Circumstances:**

1 = Leading role, 2 = Retaliatory/threatening measures taken against another entity, 3 = Obstruction of Commission investigation, 4 = Continuation of infringement after Commission investigation, 5 = Recidivism, 6 = Action contrary to compliance programme

**Mitigating Circumstances:**

7 = Industry in crisis, 8 = Co-operation with Commission, 9 = Termination of infringement on Commission intervention, 10 = Passive role, 11 = Non-implementation of infringement, 12 = Existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement  
13 = Compensation given to third parties, 14 = Jurisdiction of Sector Specific Regulator

\*\* Only symbolic fines were levied (on either all or only one of the parties) in these decisions.

**NB.** It is to be noted that the boxes which have been left blank concern decisions where the Commission is still in discussion with the parties on the identification of potential business secrets, and other confidential information to be removed from published versions of the text.

1. Gravity and Duration

1.1 Gravity

As mentioned above, the Commission categorises anti-trust infringements as minor, serious and very serious. For minor infringements the *likely* fine is to be between €1000 and €1 million, for serious infringements the *likely* fine is to be between €1 million and €20 million and for very serious infringements such as hard-core cartel activity, the *likely* fine is to be above €20 million. To date it seems that fines for a minor infringement have only been levied once since the introduction of the 1998 Guidelines. This situation can, however, be explained by the fact that an agreement which could potentially result in a minor infringement of the EC competition rules would normally have been notified to the Commission leading to immunity from fines.<sup>112</sup> Further, the Commission concentrates its resources on uncovering hard-core cartel infringements.<sup>113</sup> The *Nathan Bricolux* decision represents the only situation concerning a minor infringement where a fine was imposed other than a symbolic fine.<sup>114</sup> This decision concerned agreements concluded between Editions Nathan and its exclusive distributors, Bricolux SA in Belgium, Smartkids in Sweden and Borgione in Italy. The fixing of price levels and commercial resale conditions and the partitioning of markets are in principle serious infringements and, according to the case law, contrary to the objectives of the Common Market. However in the present case, in the part of the Common Market where the restrictions were effected, i.e. French Speaking Belgium and France, the implementation was not systematic. As a result the infringement was regarded as minor. A fine for gravity of €84.000 was therefore imposed.<sup>115</sup>

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<sup>112</sup> Article 15 (5) of regulation 17/62 states that, as far as Article 81 EC is concerned, no fines can be imposed in respect of acts “taking place after notification to the Commission [...] provided they fall within the limits of the activity described in the notification”. Companies with doubts as to the compatibility of the agreement with EC law will therefore notify as early as possible. Note that notification is no longer necessary under Regulation 1/2003, see supra note 5.

<sup>113</sup> In this respect, see the setting up of Cartel Units E1 and E2 within DG Competition.

<sup>114</sup> Commission decision of 5 July 2000, *Nathan-Bricolux*, (2001) O.J. L 54/1. A symbolic fine was imposed on one of the parties to the infringement, however.

<sup>115</sup> The Commission’s conclusion in *Nathan Bricolux* that it was a minor infringement falls squarely within the description of a minor infringement in the 1998 Guidelines.

The Commission reserves the right, in certain cases, to impose a “symbolic” fine of €1000, which does not involve any calculation based on the duration of the infringement or any aggravating or attenuating circumstances.<sup>116</sup> Since the introduction of the 1998 Guidelines, the Commission has imposed symbolic fines on four occasions. *Deutsche Post*, for example, infringed Article 82 by intercepting, surcharging and delaying cross-border letter mailing from the UK sent by senders outside Germany but containing a reference in its contents to an entity residing in Germany.<sup>117</sup> Presumably, such a violation of EC competition law would normally merit a significant fine for being a serious infringement of the EC competition rules. In this particular case, however, *Deutsche Post* acted in a manner which had been consistently condoned by the German courts. The Commission deemed that the German case law rendered the legal situation unclear. Moreover, at the time when the majority of the anti-competitive practices were occurring, no Community law existed that concerned the specific context of cross-border letter mail services. The Commission further took into account that *Deutsche Post* had undertaken a commitment to introduce a procedure enabling it to detect future infringement more easily. These factors, in the eyes of the Commission, warranted the imposition of a symbolic fine of €1000.<sup>118</sup>

With regard to serious infringements, they represent the second most common category of infringements where a fine was imposed since the introduction of the 1998 Guidelines (18 decisions thus far). According to the 1998 Guidelines serious infringements invariably include horizontal or vertical restrictions which are reasonably rigorously applied, with a reasonably wide market impact and with effects in extensive areas of the Common Market. The 1998 Guidelines further state that within this category may fall abuses of a dominant position, such as the institution of loyalty discounts. *Michelin* fits within this description.<sup>119</sup> *Michelin*’s conduct consisted in implementing a system of loyalty rebates.<sup>120</sup> The aim of the rebate system was held by the Commission as eliminating or at least preventing the growth of *Michelin*’s competitors on the French market in new replacement and retread truck tyres. The infringement was further held to have taken place in a substantial part of the Common Market, and because of the partitioning of the Common Market which it caused, its effects extended beyond the relevant market, which was the French market. *Michelin* was therefore fined €8 million under the gravity heading. The Commission has, however, been inconsistent in the admonition of this conduct. For the same abuse *British Airways* was fined €4 million,<sup>121</sup> and *Deutsche Post* was again fined €12 million.<sup>122</sup> The Commission’s differential treatment in

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<sup>116</sup> See Section 5 (d) of the Guidelines.

<sup>117</sup> Commission decision of 25 July 2001, *Deutsche Post AG - Interception of Cross-Border Mail*, (2001) O.J. L 331/40. For a thorough discussion on *Deutsche Post*’s infringements of EC Competition law see D. Geradin and D. Henry, “Regulatory and Competition Law Remedies in the Postal Sector” in *Remedies in Network Industries: EC Competition Law vs. Sector Specific Regulation*, D. Geradin (ed), Intersentia, 2004.

<sup>118</sup> A symbolic fine was also imposed in *1998 Football World Cup* (Commission decision of 20 July 1999, 1998 Football World Cup, (2000) O.J. L 5/55) on some of the parties in *Spanish Raw Tobacco* (See Commission Press Release IP/04/1256 of 20 October 2004, “Commission fines companies in Spanish raw tobacco market”) and on one of the parties in the *Nathan Bricolux* decision.

<sup>119</sup> Commission decision of 20 June 2001, *Michelin*, (2002) O.J. L 143/1.

<sup>120</sup> The CFI has recently condemned *Michelin* for its fidelity rebate policy in Case T-203/01 of 30 September 2003. For a discussion of this case see C. Roques, “CFI Judgment, Case T-203/01, Manufacture Française des Pneumatiques Michelin v. Commission”, (2004) 25 *E.C.L.R.* 688. See further K. Van Miert “Fidelity Bonuses by Dominant Companies are simply not on”, MEM/99/42, Brussels, 22 July 1999.

<sup>121</sup> Commission decision of 14 July 1999, *Virgin/British Airways*, (2000) O.J. L 30/1.

<sup>122</sup> Commission decision of 20 March 2001, *Deutsche Post AG*, (2001) O.J. L 125/27. At paragraph 39 of this decision the Commission noted that it is “It is settled European case-law that rebate arrangements which are linked to meeting a percentage of customer requirements have, solely by reason of the method by which they are calculated, an anti-competitive tying effect.”

these decisions comes without any clear explanation on its part. The size of the geographic market affected by the abuses in the three decisions may, to a certain extent, explain the differing fines, however.

As outlined above the Commission will insert a given factual scenario into one of the three categories consisting of minor, serious and very serious infringements. There are certain factors, however, that tend to create exceptions to the logic of the categories laid down.

#### *Limited geographic scope*

Cartels invariably fall into the very serious category. In some circumstances, however, although cartel arrangements are *per se* very serious infringements, the Commission will deem them as serious in the light of various factors. *Industrial and Medical Gases* involved the fixing of price increases, minimum prices and other trading conditions in the Dutch industrial and medical gases market which were by their very nature the worst kind of infringements of Article 81 EC.<sup>123</sup> In this particular case, however, the Commission concluded that the agreements and/or concerted practices concerned constituted only a serious infringement as the agreements produced an effect within a limited part of the Common Market only (the Netherlands). The situation in *Industrial and Medical Gases* decision was comparable to the situation in *British Sugar*,<sup>124</sup> *Greek Ferries* and *Dutch Association of Electrotechnical Equipment Wholesalers*,<sup>125</sup> which also concerned price-fixing arrangements but where the infringement was similarly only categorised as serious due to the limited geographical scope.

The Commission in *Industrial and Medical Gases* explicitly stated, however, that it is under no obligation to deviate from the rule that a price cartel is by its very nature a “very serious” infringement if the geographic scope of the relevant market is limited. For example, in *Interbrew / Alken-Maes* the Commission decided to maintain the category “very serious” although the price fixing and market sharing cartel between Interbrew and Danone / Alken Maes was limited to the Belgian beer sector.<sup>126</sup>

#### *Involvement of high-level management*

Amongst the notable features of the *Interbrew / Alken Maes* cartel were the threats by Danone to retaliate against Interbrew in France (taken into account as an aggravating circumstance) and the personal involvement of Interbrew’s, Alken Maes’ and Danone’s top managers at the time. The CEO’s themselves and other top managers of the companies met regularly to initiate and monitor illicit agreements. This fact gave the case a more global relevance when considering that Interbrew is the number two player in the world and Alken Maes’ mother company Danone a leader in the world industry.

#### *Importance of the sectors concerned for the economy*

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<sup>123</sup> Commission decision of 24 July 2002, *Industrial and Medical Gases*, (2003) O.J. L 84/1.

<sup>124</sup> Commission decision of 14 October 1998, *British Sugar*, (1999) O.J. L 76/1.

<sup>125</sup> Commission decision of 26 October 1999, *FEG & TU*, (2000) O.J. L 39/1.

<sup>126</sup> Commission decision of 5 December 2001, *Interbrew and Alken Maes*, (2003) O.J. L 200/1.

In *Austrian Banks*,<sup>127</sup> the cartel was described as very serious although the price fixing agreement between the eight Austrian banks was limited to the Austrian bank sector. In its classification of that case the Commission was guided by the conviction that the banking sector is of outstanding importance for consumers, businesses and therefore the economy as a whole. Furthermore, the cartel network was comprehensive as regards its contents. The fixing of interest rates for loans and savings, for private/household and for commercial customers as well as the fees customers had to pay for certain services was highly institutionalised and covered the entire country down to the smallest village.

#### *No prior Commission decision*

Though abuses of a dominant position are generally considered to be serious abuses of the EC competition rules, the factual scenario in *Deutsche Telekom* was only narrowly put into this category.<sup>128</sup> The abuse committed by Deutsche Telekom consisted in the imposition of unfair prices in the form of a margin squeeze to the detriment of DT's competitors. As the abuse involved the whole of Germany and put into jeopardy the proper functioning of the Common Market by establishing barriers to entry in the German telecommunications markets and therefore potentially thwarting the creation of an internal market for telecommunications network services with undistorted competition,<sup>129</sup> this would normally warrant a finding of a very serious infringement.<sup>130</sup> Further, Deutsche Telekom was deemed to have held 95% of the German market for local network access which exacerbated the abusive conduct. However, the Commission regarded the particular abuse as only serious as the weighted method applied to determine the margin squeeze had not previously been the subject of a formal Commission decision and the fact that, through tariff adjustments at retail and wholesale level, Deutsche Telekom had steadily reduced the margin squeeze, since 1999 at least. Deutsche Telekom therefore only received a €10 million fine under the heading of gravity.<sup>131</sup>

#### *Importance of monetary sums involved in infringement*

*Seamless Steel Tubes* involved a cartel consisting in the observation of the domestic markets of the different European and Japanese producers in seamless steel pipes and tubes. The Commission held that, in principle, such arrangements are very serious infringements of Community law since they jeopardise the proper functioning of the single market. Further, this flouting of the competition rules was aggravated by the fact that the parties introduced a secret, institutionalised system designed to restrict competition in an important industrial sector. The Commission, however, noted that the sales of the products concerned in the four Member States in question amounted to only about €73 million. The Commission therefore fixed the fine at €10 million to reflect the gravity of the infringement, an amount usually levied for serious infringements despite the fact that the infringement was categorised as very serious.

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<sup>127</sup> Commission decision of 11 June 2002, *Austrian Banks*, not yet published in the Official Journal but on Europa website.

<sup>128</sup> Commission decision of 21 May 2003, *Deutsche Telekom*, (2003) O.J. L 263/9.

<sup>129</sup> See, for example, the Commission's "Green Paper on Vertical Restrictions", COM(96) 721 Final, where the Commission repeatedly emphasises the single market imperative.

<sup>130</sup> See Section 1 (A) of the Guidelines.

<sup>131</sup> For a discussion on margin squeezes see D. Geradin and R. O'Donoghue "The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector" forthcoming in the *Journal of Competition Law and Economics*, (2005).

From the above it can therefore be concluded that there is no bright line between serious and very serious infringements.

Very serious infringements feature most prominently in Commission decisions where fines are imposed (31 decisions since the introduction of the 1998 Guidelines). Cartels are, however, not the only type of infringement pertaining to the category of very serious infringements. The Commission, as noted above, takes a particularly dim view of practices which forestall competition such as impediments to parallel trade.<sup>132</sup> The export ban/restriction pursued in *Volkswagen* was severely reprimanded by the Commission in 1998.<sup>133</sup> The obstruction of parallel exports of vehicles by final consumers and of cross-deliveries within the dealer network was deemed to have hampered the objective of the creation of the Common Market and was solely for that reason regarded as a very serious infringement. Volkswagen received a huge €50 million fine under the heading of gravity. More recently, Opel similarly fell foul of the competition rules by implementing a system analogous to that of Volkswagen.<sup>134</sup> The Commission once again reiterated the single market imperative and imposed a fine of €40 million for gravity as it was a very serious infringement. In the same manner in *Mercedes*,<sup>135</sup> the measures aimed at restricting exports outside the contract territory were classified as very serious meriting a €33 million fine under the heading of gravity. Why the three start amounts are different between Volkswagen, Opel and Mercedes are different is difficult to glean from the decisions. The fact that Volkswagen had the highest market share of any motor vehicle manufacturer in the EC may have played a role, however, in its receiving a higher fine.

We have already mentioned that abuses of a dominant position for the most part fall into the category of serious infringements. *TACA*, however, represents one of the few decisions where the Commission has deemed the abuse as very serious. The Commission in 1998 adopted a decision in 1998 finding that the parties to the Trans-Atlantic Conference Agreement (TACA) had through two different practices twice abused its joint dominant position.<sup>136</sup> Individual service contracts were openly banned by the TACA in 1995 and even after 1995 all service contracts were only available on the basis of highly restrictive conditions (in particular the ban on multiple contracts and contingency clauses). In addition, the parties to the TACA had abused their joint dominant position through inducing potential competitors to join the TACA and thereby altering the competitive structure of the market. This was achieved through a variety of different ways, most notably by agreeing that shipping lines which were not traditionally conference members, were allowed to charge a lower price in service contracts than the price charged by the traditional conference members. The purpose and effect of the TACA agreement to enter into dual rate service contracts was to limit competition from independent ship-owners by bringing them inside the TACA conference. The importance of potential competition in liner shipping markets made the second infringement all the more serious.<sup>137</sup> The Commission therefore imposed a fine of €273 million on the member

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<sup>132</sup> The recent Bayer judgment of the ECJ delineates the boundaries of the single market imperative pursued by the Commission, see Judgment of the European Court of Justice, Joined Cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittelimporteure eV and Commission v. Bayer*, not yet reported

<sup>133</sup> Commission decision of 28 January 1998, *Volkswagen*, supra note 101.

<sup>134</sup> Commission decision of 20 September 2000, *Opel*, (2001) O.J. L 59/1.

<sup>135</sup> Commission decision of 10 October 2001, *Mercedes*, (2002) O.J. L 257/44.

<sup>136</sup> The Commission also found infringements of Article 81 such as the fixing of tariffs and brokerage fees.

<sup>137</sup> It should be noted in this context that an undertaking in a dominant position “has a special responsibility not to allow its conduct to impair genuine undistorted competition”, see Judgment of the European Court of Justice, Case 322/81, *NV Nederlandsche Banden-industrie Michelin v. Commission*, [1983] E.C.R. 3461.

companies of the conference, which constitutes the highest amount ever imposed on undertakings in a collective dominant position.

A swingeing fine has also recently been imposed in *Microsoft* where Microsoft was held to have abused its dominant position by both refusing to supply information necessary to achieve interoperability between its client PC and server operating systems and third party workgroup server operating systems and tying the provision of the Microsoft Windows client PC operating system to Windows Media Player, Microsoft's multimedia playback software.<sup>138</sup> Such behaviour was deemed a very serious infringement of Article 82 taking into account, *inter alia*, the fact that refusal to supply and tying by undertakings in a dominant position had already been ruled against on several occasions by the ECJ and that the pattern of exclusionary leveraging behaviour engaged in by Microsoft had a significant impact on the markets for work group server operating systems and for streaming media players. These factors warranted a fine of €166 million to reflect the gravity of the infringement which was subsequently weighted by a factor of 2 to allow for a sufficiently deterrent effect on Microsoft. The final fine of €497 million is the highest fine ever imposed on an individual undertaking.<sup>139</sup>

Within the category of very serious infringements, cartel behaviour is the most common anti-competitive practice. Turning to cartel behaviour, the unearthing and punishment of such anti-competitive constellations is at the top of the Commission's agenda,<sup>140</sup> which is evidenced by the novel ability of the Commission to search, under Article 21 (1) of Regulation 1/2003, private homes when it is suspected that professional documents are kept there.<sup>141</sup> As a consequence, members of a cartel will almost always attract harsh fines as they "injure consumers in many countries by raising prices and restricting supply" and further "create market power, waste and inefficiency in many countries whose markets would otherwise be competitive".<sup>142</sup> The Commission therefore invariably categorises them as very serious infringements of EC competition law. The *Vitamins* decision is worth looking at in this

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<sup>138</sup> For a good discussion of the Commission's decision in *Microsoft* see J-Y Art and G. S. McCurdy, "The European Commission's Media Player Remedy in its *Microsoft* decision: Compulsory Code Removal Despite the Absence of Tying or Foreclosure, (2004) 25 *E.C.L.R.* 694 and M. Dolmans and T. Graf, "Analysis of Tying Under Article 82 EC", (2004) 27 *World Competition* 225.

<sup>139</sup> The CFI, on 22 December 2004, entirely dismissed Microsoft's objections to the sanctions imposed on it by the Commission. The CFI ruled that the Commission's decision does not "cause serious and irreparable damage" to Microsoft. Microsoft had requested an interim measure from the CFI which, in its refusal, means that Microsoft will have to implement the Commission's decision in time.

<sup>140</sup> For a discussion on cartel behaviour and its effects see "Recommendation of the OECD Council Concerning effective Action Against Hard Core Cartels", OECD, Paris, 1998 and "Fighting Hard Core Cartels-Harm, Effective Sanctions and Leniency Programmes, OECD Paris, 2002. The new Competition Commissioner Nelly Kroes recently stated that "The Commission will simply not tolerate that the benefits of the EU's Single Market are denied to customers and other anti-competitive practices. We will not allow the advantages of abolishing physical frontiers and creating pan-European markets to be neutralised by companies carving up the spoils amongst themselves. I have made it crystal clear that the fight against cartels will be one of my top priorities as Competition Commissioner", Commission Press Release IP/04/1454 of 9 December 2004 "Commission imposes €66.34 million fines on animal feed vitamin cartel".

<sup>141</sup> In *Graphite Electrodes* (Commission decision of 18 July 2001, *Graphite Electrodes*, (2002) O.J. L100/1) and *Organic Peroxides*, supra note 40, for example, home faxes were used to contact competitors in order to circumvent the Commission's powers of inspection. Under Regulation 1/2003 such evidence will no longer be outside the purview of the Commission's powers of inspection.

<sup>142</sup> Recommendation of the OECD Council Concerning effective Action Against Hard Core Cartels", OECD, Paris, 1998, p. 2.

context as it is possibly the most pernicious cartel uncovered thus far by the Commission.<sup>143</sup> Eight pharmaceutical companies were found guilty of having entered into eight distinct secret market-sharing and price-cartels affecting vitamins products. Hoffman-La-Roche and its co-conspirators had, for each of the cartels, fixed prices for the different vitamin products, allocated sales quotas, agreed on and implemented price increases and issued price announcements in accordance with their agreements. Further, instruments were set up to oversee this web of iniquity and various clandestine meetings had been held. The Commission unsurprisingly deemed this infringement as very serious and imposed a fine of €185 million on Hoffman La Roche for gravity. The final amount imposed on Hoffman-La-Roche came to €462 million. This was despite the fact that Hoffman-La-Roche had pleaded guilty to similar anti-competitive conduct in the US and was fined \$225 million.

With respect to the principle of *ne bis in idem*, the Commission in *Vitamins* did not consider, however, that fines imposed elsewhere, including in the US, had any bearing on the fines to be imposed for infringing EC competition rules. The Commission stated that the exercise by the US (or any third country) of its (criminal) jurisdiction can in no way limit or exclude the Commission's jurisdiction under EC competition law. More importantly, the Commission highlighted that it did not intend to sanction the undertakings for the same facts as the US courts had. By virtue of the principle of territoriality, Article 81 EC was deemed to be limited to restrictions of competition in the Common Market. In the same way, the Commission observed that the US anti-trust authorities only exercise jurisdiction to the extent that the conduct has a direct and intended effect on US commerce.

Having assessed the gravity of a given infringement and before assessing the duration of the infringement, the Commission may upwardly adjust any fines in order to ensure that the fine has a sufficiently deterrent effect, raising awareness of the consequences stemming from that conduct under EC competition law. In this context, the Commission takes account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and it raises. With regards to ABB in *Pre-insulated Pipes*,<sup>144</sup> for example, the appropriate starting amount for a fine resulting from the criterion of the relative importance in the relevant market required further upward adjustment to take account of its position as one of Europe's largest industrial combines. The need for deterrence in ABB's case resulted in the starting amount of €20 million being weighted by 2.5.<sup>145</sup> Bizarrely, in *Amino Acids*, involving a global price-fixing cartel for lysine, ADM received no uplift for deterrence although it is a company with a total turnover of €12 billion. Further, the Commission gave no explanation for this. Indeed, it is difficult to see why it did not adjust the fine upwards for deterrence in the case of ADM, especially when the Commission itself recognised the inapplicability of the *ne bis in idem* principle in the competition law proceedings *in casu*.

One should finally note that where an infringement involves several players, in line with the principle of equal punishment for the same conduct, the base amounts for each undertaking may vary according to "the specific weight and, therefore, the real impact of the offending

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<sup>143</sup> Commissioner Mario Monti stated that this case was "the most damaging series of cartels the Commission has ever investigated", Commission Press Release IP/01/1625 of 21 November 2001, "Commission imposes fines on vitamin cartels".

<sup>144</sup> *Pre-Insulated Pipes*, supra note 50.

<sup>145</sup> The highest weighting so far for deterrence is 300% for Lafarge in Commission decision of 27 November 2002, *Plasterboard*, not yet published but see Commission Press Release IP/02/1744 of 27 November 2002, "Commission imposes heavy fines on four companies involved in Plasterboard cartel".

conduct of each undertaking on competition, particularly where there is a considerable disparity between the sizes of the undertakings committing infringements of the same type”.<sup>146</sup> Indeed, the Commission when assessing the fine for cartel operations, which involve undertakings of different sizes, will group the undertakings in this respect depending on their respective size and turnover.<sup>147</sup>

In *Citric Acid* involving a price-fixing and market-sharing cartel in citric acid, for example, where the Commission found that the parties had committed a very serious infringement, the Commission considered it appropriate to take the worldwide product turnover as the basis for assessing the relative importance of an undertaking in the market concerned in order to impose condign fines. Given the global character of the market in this case, these figures were deemed to have given the most appropriate picture of the participating undertaking’s capacity to cause significant damage to other operators in the Common Market and/or EEA. This approach was supported by the fact that the citric acid cartel was a global cartel. The worldwide turnover of any given party to the cartel was also recognised as giving an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated. In the *Citric Acid* decision, Haarman &Reimer, with a worldwide market share of 22% was the largest player in the market while Hoffman-La-Roche had a market share of 9% and Cerestar had only a market share of 2.5%. Haarman & Reimer, given its large market share was placed in the first group and received a starting amount for a fine, on the basis of the criterion of relative importance, of €35 million. Cerestar, which was by far the smallest player was placed in the third group and received a starting amount for a fine, on the basis of the criterion of relative importance in the market concerned of €3.5 million.<sup>148</sup>

The taking of world-wide product turnover into account is deemed not always relevant when an international cartel involves price-fixing rather than market sharing. In such a case the turnover in the product market affected by the infringement in Europe would be a more reliable indicator to assess the effect on the European market, especially when one takes into consideration the EC competition law concerns itself with the anti-competitive impact of illegal behaviour on the Community market. It may therefore be an opportune moment for the CFI to revisit the debate on turnover and outline some principles as to which turnover should be taken into account instead of a general blanket use of worldwide turnover without any real assessment of the nature of the anticompetitive conduct in question.<sup>149</sup>

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<sup>146</sup> See section 1 (A) of the 1998 Guidelines.

<sup>147</sup> In this context the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertakings concerned, or to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their turnover in the relevant product market, Judgment of the Court of First Instance, Case T-23/99, *LR AF v. Commission*, (2002) E.C.R. II 1705. para. 278.

<sup>148</sup> It would seem that the Commission’s policy is to maintain a low range of start points and therefore have as few groups as possible. The *Amino Acids* decision bears testimony to this where five cartel members were put into a mere two groups with ADM and Ajinomoto receiving a starting fine of €30 million and the others a starting fine of €15 million. See *Speciality Graphites*, (See Commission Press Release IP/02/1906 of 17 December 2002, “Commission fines seven companies in speciality graphites cartel”, where there were five groups for only 8 undertakings, however. The approach of grouping different undertakings has been noted by some commentators as making it practically impossible to predict what the starting point for the basic amount will be in a given case, S. Mobley and M. Arakistain, “How the European Commission sets Cartel Fines, (2000) 14- *SUM Antitrust* 26.

<sup>149</sup> J.F. Bellis, *supra* note 66, p. 379.

## 1.2 Duration

Having established the gravity of a given infringement, the Commission will then consider its duration. For short term infringements (found in 5 decisions in which fines have been imposed), the amount is not increased. For medium-term infringements of the law (found in 24 decisions), the amount determined for gravity is augmented by up to 50% and in cases of long duration (found in 28 decisions), the amount determined for gravity is hiked up by 10% per year. In the case of medium and long-term infringements the Commission will normally increase the fine by 10% per year with an increase of 245% being the maximum increase which has been imposed since the introduction of the 1998 Guidelines.<sup>150</sup> For example, in *Methionine*,<sup>151</sup> involving a price-fixing cartel in methionine, Aventis, Degussa and Nippon Soda had committed the infringement for 12 years and 10 months. The starting amounts for gravity were therefore increased by 10% per year (and 5% per six months) i.e. by 125%.

As mentioned, the Commission will normally increase the fine by 10% per year in cases of medium and long duration, but in the case of infringements of long duration where parts of the infringement were in operation in the 1970s, the Commission will only increase the fine by 5% per year for the years appertaining to the 1970s. In *Organic Peroxides*, the Commission justified this less strict approach by the fact that competition policy was less vehemently pursued in the 1970s, companies were less aware that their behaviour infringed competition law and fines were lower. In addition, the Commission will not mechanically increase the fines by 10% per year but will vary the percentage taken into account for duration depending on the intensity of infringement. For example in *Opel*, the infringements in place varied in intensity during 17 months. The fine was increased by 7.5% instead of the normal 10%.<sup>152</sup> Similarly, in *JCB*,<sup>153</sup> the Commission noted that overall JCB had been infringing EC competition law between 1988 and 1998. As JCB's transgression of the competition rules encompassed a wide range of different elements only one of them had lasted for a period of 11 years. Restrictions on distributor's ability to determine resale prices were only in force between 1991 and 1996 and the restrictions of cross-supplies between distributors was only in force between 1992 and 1996. The varying intensity of the competition law infringements led the Commission to increase the duration by only 55% despite the fact that one of the elements of the infringements began in 1988 and ended in 1998. Obviously, the Commission will not increase the fine for duration if the anti-competitive agreement is not put into effect. In *French Beer*,<sup>154</sup> which represents the only decision since the introduction of the 1998 Guidelines where there was no increase for duration (other than where symbolic fines were imposed), it was concluded by the Commission that Danone and Heineken had concluded to establish an equilibrium between their integrated beer distribution networks and limit the acquisition costs of drinks wholesalers. As the agreement was never implemented there was no increase for duration. Both parties, however, received a € 1.000.000 fine with regards the gravity of the infringement.

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<sup>150</sup>See Commission decision of 10 December 2003, *Organic Peroxides*, supra note 40, with regards to the undertakings Akzo and Atochem.

<sup>151</sup> Commission decision of 2 July 2002, *Methionine*, (2003) O.J. L 255/1.

<sup>152</sup> In this context see also the Commission's decision in Volkswagen where Volkswagen's conduct, though spanning a decade, fluctuated in degree at various points in time.

<sup>153</sup> Commission decision of 21 December 2000, *JCB*, (2002) O.J. L 69/1.

<sup>154</sup> Commission decision of 29 September 2004, *French Beer*, not yet published in Official Journal but on Europa website.

The systematic increase in fines depending on the duration of an infringement could, however, nurture an environment whereby undertakings operate a cost-benefit analysis when deciding whether to sustain an infringement until its natural death instead of ceasing it. For example, if a company is fined €100,000 for having initiated the anti-competitive conduct then over a five year period the maximum increase for duration would be € 50.000. In such circumstances the undertaking in violation of the competition rules may deem it sensible to continue with the infringement for at least five years.<sup>155</sup> Indeed, this would be all the more so where the parties to the infringement are not in a cartel as the leniency programme would not apply enabling the parties to continue operating the illegal behaviour without the fear that other undertakings will race to the Commission and blow the whistle.<sup>156</sup> On the other hand, however, such a calculation bears risks since as times lapses the risk of detection by the Commission also increases.<sup>157</sup>

## 2. Aggravating and Attenuating Circumstances

The Commission, subsequent to reaching a basic amount of fine, will either increase or decrease the fine according to whether there are any aggravating or mitigating circumstances. Within the category of mitigating or aggravating circumstances, the Commission has entertained a wide range of factors when imposing fines which are not always explicitly mentioned in the 1998 Guidelines.<sup>158</sup>

### 2.1 Aggravating Circumstances

#### *Leading role*

The most prevalent aggravating factor found in the decisions is that of either playing the leading role in the cartel or being the instigator of the anti-competitive agreement (found in 13 decisions). The first decision, since the introduction of the 1998 Guidelines in which this factor was taken into account concerned the *Alloy Surcharge* cartel.<sup>159</sup> Usinor was found to have played the leading role in this cartel as it did all the calculations at one of the cartel's strategic meetings and sent the conclusions of the meeting and the definitive calculation of the alloy surcharge to the producers after the meeting. Usinor's preponderant role therefore justified an increase of 25% of the basic amount of fines imposed on it. In *Pre-insulated Pipes*, a decision flagging up a variety of aggravating circumstances, ABB bore pressure on the other cartel members to enter into the agreement in the first place. It therefore saw its fine increased by 50% for, *inter alia*, being the ringleader and instigator of the cartel.

More recently, in *Nintendo/Video Games*,<sup>160</sup> the Commission increased the basic fine by 50% on Nintendo as it was, in addition to being found guilty of other aggravating factors, the

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<sup>155</sup> See P. Spink "Recent Guidance on Fining Policy" (1999) 20 *E.C.L.R.* 102.

<sup>156</sup> The leniency notice only applies to cartels.

<sup>157</sup> For a discussion on the rates of discovery of international cartels, see J. M. Connor, "International Price Fixing: Resurgence and Deterrence", Presented at First Workshop of the Research Training Network: Competition Policy in International Markets, Toulouse, 17/18 October 2003.

<sup>158</sup> The Commission's Guidelines contain a non-exhaustive list of aggravating and attenuating circumstances. Within the category of aggravating circumstances, the Guidelines mention, for example recidivism or the role of instigator in the infringement. Within the category of attenuating circumstances, an exclusively passive role or doubt on the part of an undertaking as to whether the conduct constitutes an infringement are mentioned.

<sup>159</sup> Commission decision of 21 January 1998, *Alloy Surcharge*, (1998) O.J. L 100. *Alloy Surcharge* concerned an infringement of Article 65 ECSC Treaty, the provisions of which closely resemble Article 81 EC.

<sup>160</sup> Commission decision of 30 October 2002, *Nintendo/Video Games*, *supra* note 101.

leader and instigator of an anti-competitive distribution agreement involving the monitoring of parallel trade, enforcing the measures to prevent it and directly benefiting from their implementation. In *Carbonless Paper*, strong evidence corroborated the Commission's finding that AWA was the principal leader of the cartel. AWA, with its economic leadership in the carbonless paper market, was held to have been in a position to exercise pressure on its competitors due to the fact that it acquired or distributed large proportions of some small producers' output. It also had also a key role in monitoring and ensuring compliance with the agreements. This fact led to an increase of 50% of the basic amount of the fine. In *Graphite Electrodes*,<sup>161</sup> both SGL and UCAR were found to have been the ringleaders in the cartel as they had, for example, organised the "Top Guy" meeting at chief executive level to agree concerted price increases usually triggered by the "home producer" or market leader and then followed in other parts of the world. SGL's fine was increased by 85% while UCAR's was only increased by 60%. SGL and UCARs' increase of 85% and 60% respectively reflected a variety of aggravating factors. The lesser percentage increase for UCAR mirrors the fact that the Commission had found less aggravating factors in its case.

In *Vitamins*, on the other hand, the Commission explicitly differentiated between the two ringleaders (Roche and BASF) in this cartel. BASF received a milder increase under this heading as it was Roche that was the real prime mover and it stood to gain the most from the collusive arrangements. In *British Sugar*, British Sugar was held to have been the instigator of the agreement and/or concerted practice, and throughout the relevant period, it was the driving force behind the infringement. This classification of British Sugar was borne out by the fact that key meetings, which set the principles for the future anti-competitive conduct, were convened on British Sugar's initiative. For, inter alia, this aggravating circumstance the fine was increased by 75%.

#### *Retaliatory/Threatening measures taken against another entity*

This factor is seen as one of the most serious aggravating factors by the Commission. One member of the cartel acting in retaliation or threatening another member or a third party is a relatively common aggravating factor taken into consideration (found in 5 decisions). Volkswagen, which had already been found in violation of the competition rules had, for example, been systematically urging, by means of circulars, all members of the distribution network to maintain price discipline. The aggravating factor taken into account in the *Volkswagen II* decision was the fact that two of the three circulars and some individual letters to dealers were not just intended to restrict the freedom of dealers to set their prices, but warnings were given and legal steps, energetic reactions or indeed terminations of contract were threatened unless dealers demonstrated greater price discipline.<sup>162</sup> The basic amount of the fine was therefore increased by 20%.<sup>163</sup>

In *JCB*, concerning the agreements and practices governing the distribution in the Community of construction and earthmoving equipment and spare parts manufactured and sold by the JCB Group, JCB was further penalised for taking retaliatory measures against Gunn JCB. Gunn JCB failed to conform with the agreement in question, as a result of which it was the

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<sup>161</sup> Commission decision of 18 July 2001, *Graphite Electrodes*, supra note 141.

<sup>162</sup> Account was also taken of the fact that the Marketing Director of Germany personally called on the German Volkswagen dealers and garages in the first circular of September 1996 to bring to "[his] notice any advertisements by Volkswagen network members who are not observing price discipline" thus increasing pressure on the dealers to fall in line with the demanded price, see para. 33.

<sup>163</sup> Commission decision of 29 June 2001, *Volkswagen II*, (2001) O.J. L 262/14.

victim of a €432.000 sanction. This aggravating circumstance moved the Commission to increase the basic amount by €864.000.

More recently, in *French Beef*,<sup>164</sup> involving an agreement concluded between six French federations in order to set a minimum purchase price for certain categories of cattle and suspend imports of beef into France, some members of farmers' federations used violence in order to compel slaughterers' federations to accept the above-mentioned agreement. The fines were increased by 30% on three farmers' federations for this conduct.

Retaliatory measures are, however, not only taken against members of the cartel itself. In the particularly pernicious *Pre-insulated pipes* cartel, retaliatory action was taken, not against a co-conspirator for failing to abide by the terms of the agreement, but in order to drive a competitor out of the market. Retaliatory action in this case included a concerted effort by ABB to lure key members of a competitor's (Powerpipe) staff away from it in order to hamper Powerpipe in the market. Indeed, the gravity of this conduct was exacerbated by a stepping up of the effort of the cartel members to eliminate Powerpipe from the market, after Powerpipe had lodged a complaint concerning the cartel but before the Commission had carried out its investigation.

In 2001, in *Interbrew*, Danone's threat to destroy Interbrew on the French market if 500.000hl of beer were not transferred to Alken Maes led to an extension of the co-operation (gentleman's agreement) between Interbrew and Alken Maes. These threats led to the Commission increasing the basic fine on Danone by 50%.

#### *Action contrary to a compliance programme*

This aggravating factor is one of the less common aggravating factors taken into account by the Commission (found once thus far). Indeed, the 1998 Guidelines imply that the lack of a compliance programme may lead to a higher fine, the corollary of this being that the adoption of a compliance programme may count as an attenuating circumstance.<sup>165</sup> With regard to the connection between a compliance programme and aggravating circumstances, *British Sugar* demonstrates that acting in a manner contrary to the clear wording contained in a compliance programme, which an undertaking has put into effect, may lead to considerably higher fines.<sup>166</sup> In *British Sugar* this aggravating factor, amongst others, led to the Commission increasing the fine by 75%. Many undertakings are now advised to implement some kind of compliance programme in order to ensure that they do not transgress the EC competition rules.<sup>167</sup> They should also be advised that, while adopting a compliance programme may

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<sup>164</sup> Commission decision of 2 April 2003, *French Beef*, (2003) O.J. L 209/12.

<sup>165</sup> See section 1 A of the Guidelines which takes note of the fact that large corporations should have extensive knowledge of the EC competition rules. In *National Panasonic*, initiation of proceedings in respect of an infringement by a UK subsidiary led the Japanese parent company to establish a competition law compliance programme covering the activities of all the European subsidiaries. This led to the fine imposed on the UK subsidiary being substantially reduced, Commission decision of 7 December 1982, *National Panasonic*, (1982) O.J. L 354/28.

<sup>166</sup> With regard to the connection between a compliance programme and attenuating circumstances, *British Sugar* had its fine reduced for the introduction of the same compliance programme mentioned above in 1986, see Commission decision of 18 July 1988, *Napier Brown*, (1988) O.J. L. 284/41.

<sup>167</sup> An effective competition law compliance programme is important to a corporation in two respects: (1) the prevention of anti-trust violations in the first instance, and (2) - the early detection of violations that do occur. Early detection increases the opportunity to gain immunity from fines through the application of a leniency programme, J.M. Griffin, "An Inside Look at a cartel at work: Common characteristics of international cartels", in *Fighting Cartels, Why and How?*, Swedish Competition Authority, 2001, p. 29.

count as an attenuating circumstance, failure to comply with the programme may subsequently be seen as an aggravating circumstance.

#### *Continuation of infringement after the Commission investigations*

This aggravating factor has also been reasonably common in Commission fining decisions (found in 5 decisions). *Pre-insulated Pipes* once again provides ample evidence of conduct which the Commission regards as very grave. Despite the investigations made by the Commission, the cartel arrangements including price-fixing, market sharing and bid-rigging, continued virtually as before until at least the time when the Commission's Article 11 information requests were received. It was decided by the parties that, despite the Commission investigation, the clandestine meetings should continue but greater effort should be made to conceal their time and location. Among the measures adopted in an attempt to hide the continued existence of the cartel were (i) holding all director's club meetings outside the Community (ii) where possible, travelling by car rather than by air and (iii) arranging for the Danish participants to use Logstor's private aircraft. Tarco, Starpipe and Pan-Isovit each had their basic fine increased by 20% for their flagrant continuation of the cartel after the launching of a Commission investigation. Similarly in *Graphite Electrodes*, the simultaneous investigations conducted by the Commission and the United States Anti-trust authorities did not put an immediate end to the cartel. The two most powerful members of the cartel, UCAR and SGL even dissected the outcome of the investigations and assured one another that no incriminating documents had been found.

#### *Obstruction of Commission investigation*

Efforts to stymie a Commission investigation is considered as a particularly serious aggravating factor (found in 4 decisions). This is evidenced by the recent escalation in potential fines that can be imposed on companies under Article 23 (1) of Regulation 1/2003 for the obstruction of Commission investigations.<sup>168</sup> SGL in *Graphite Electrodes* was deemed to have obstructed the Commission investigation by having warned the other co-conspirators of forthcoming Commission investigations. Its basic fine was increased by 85% for, inter alia, this aggravating factor. In *Greek Ferries*, Minoan Lines, in order to thwart the Commission's investigation, instructed the other cartel members to differentiate their prices by 1% for four cabin categories. This constituted a deliberate attempt to pull the wool over the Commission's eyes which justified an increase of 10% of its basic fine.<sup>169</sup> In the *Nintendo/Video Games* decision, John Menzies, subsequent to a request for information, adduced false information which misled the Commission as to the exact scope of the infringement. This blatant refusal to co-operate with the Commission warranted an increase of 20% on the basic fine.

#### *Recidivism*

This is also an aggravating factor which the Commission sees as very serious (found in 5 decisions). In 2001, the Commission imposed a fine €19.760.000 on Michelin for its abuse of a dominant position by implementing a system of loyalty-inducing rebates. An element of this

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<sup>168</sup> See Monti speech, where Monti states "the current level of fines [for breaches of procedural rules, which are maximised at €5000, have no deterrent effect at all". See Article 15 of regulation 17. The only decision since the introduction of the Guidelines where fines have been imposed for breach of Article 15 of Regulation 17 is Commission decision of 14 December 1999, *Anheuser Busch/Scottish & Newcastle*, (2000) O.J. L 49/37. Both parties received a fine of €3000 for the incorrect supply of information.

<sup>169</sup> Included in the 10% increase was the fact that Minoan was also ringleader.

fine entailed a 50% increase due to the fact that it had already been found guilty of abusing its dominant position in 1981 for exactly the same conduct which was subsequently upheld by the ECJ.<sup>170</sup> The Commission noted in *Michelin* that “recidivism is a circumstance which justifies a significant increase in the basic amount of the fine. Recidivism constitutes proof that the sanction previously imposed was not sufficiently deterrent”. The Commission further made short shrift of Michelin’s argument that because the 1981 abuse was on a different geographic market it could not constitute a repetition of the same infringement stating that “when a dominant undertaking has been censured by the Commission it has a responsibility not only to put an end to the abusive practices on the relevant market but also to ensure that its commercial policy throughout the Community conforms to the individual decision notified to it”.<sup>171</sup>

Similarly in *Interbrew/Alken Maes*, which involved two different cartels, Danone was reprimanded for the fact that it had participated in similar anti-trust infringements on two previous occasions and the fact that these previous infringements occurred in a different sector (flat glass) was deemed irrelevant.<sup>172</sup> What mattered were the nature of the infringement and the identity of the company. Given that Danone took retaliatory measures against another entity and that this was a repeat infringement, the basic amount of fine imposed on Danone was hiked up by 50%.<sup>173</sup> Recently, Danone has again been reprimanded for its anti-competitive conduct in *French Beer* through colluding with Heineken to establish an equilibrium between their integrated beer distribution networks and limit the acquisition costs of drinks wholesalers. The Commission in this decision laid down the principle that the concept of repeated infringement or recidivism is not subject to any period of limitation and that it may therefore hark back to previous infringements which may have occurred many years before by the same undertaking.

Similarly, several of the addressees in *Organic Peroxides* and their economic predecessors had, in blatant disregard of the Competition rules, already been subject to previous Commission measures in cartel cases.<sup>174</sup> The basic amount of the fine was therefore increased by 150% for Atochem, Laporte and Peroxid Chemie. The Commission in *Speciality Graphites* has further recently established that if two infringements are contemporaneous, then there is no question of recidivist behaviour.<sup>175</sup> Finally in the recent *Sorbates* cartel decision,<sup>176</sup> Hoechst received the highest fines (€99 million) amongst the members of the cartel as it had been an addressee

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<sup>170</sup> Judgment of the European Court of Justice, Case C-322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, [1983] E.C.R. 3461.

<sup>171</sup> Para 362.

<sup>172</sup> See Commission decision of 15 May 1974, *Glass Containers*, (1974) O.J. L 160/1 and Commission decision of 23 July 1984, *Glass Containers*, (1984) O.J. L 212/13. (Danone was called BSN at the time of these two previous infringements) infringements. The same person acted as CEO of the same company.

<sup>173</sup> In the *Plasterboard* cartel decision, see supra note 145, the Commission considered that the sole fact that the same enterprise has already been the object of a finding of the same Treaty provision on a previous occasion counts as recidivism.

<sup>174</sup> For example, Commission decision of 23 November 1984, *Peroxygen Products*, (1985) O.J. L 35/1 addressed to inter alia, Laporte Industries (Holdings) plc, Commission decision of 23 April 1986, *Polypropylene Products*, (1986) O.J. L 230/1 addressed to Atochemie SA and Petrofina SA.

<sup>175</sup> Commission decision of 17 December 2002, *Speciality Graphites*, see supra note 148.

<sup>176</sup> See Commission Press Release IP/03/1330 of 2 October 2003 “Commission fines four companies in sorbates cartel a total of 138.4 EUR million” and B. List “Commission adopts Cartel decision imposing fines in Sorbates Cartel” 1 *Competition Policy Newsletter* 40.

of previous decisions finding an infringement of the same type.<sup>177</sup> Though recidivism may be taken into account as an aggravating factor, the fact that an undertaking has not infringed the relevant Treaty provision before will usually not be regarded as an attenuating circumstance, however.<sup>178</sup>

## 2.2 Mitigating Circumstances

### *Industry in Crisis*

In the heavy industry sector, the Commission has been mindful that many of these industries are in decline. Although not generally willing to exempt cartel behaviour from the Article 81 prohibition under these critical circumstances, there are some limited scenarios, such as rationalisation cartels in which there is chronic industry overcapacity,<sup>179</sup> where an exemption under Article 81 (3) EC may be justified subject to strict conditions. Within the context of fines, the Commission has (rarely) taken this factor into account in order to decrease the basic amount of fines as an attenuating circumstance (found in 2 decisions).<sup>180</sup> In *Seamless Steel Tubes*, the Commission was sympathetic to the deterioration of the steel pipe and tube industry noting that since 1991, the sector had suffered due to the growing influx of imports, which resulted in capacity reductions and plant closures. In this particular case, these considerations warranted a reduction of 10% in the basic amounts.

Similarly in *Alloy Surcharge*, the Commission was receptive to the argument that the economic situation in the stainless steel sector at the end 1993 was particularly critical. The price of nickel was rising rapidly, while the price of stainless steel was very low. The parties therefore received a 10% reduction in fines to reflect this situation.<sup>181</sup> In *Methylglucamine*,<sup>182</sup> however, the Commission laid down the principle that a market cannot be characterised as in a state of crisis because the market is stagnating or slowly declining.

Related to the issue of the industry being in crisis as a whole is that of companies finding themselves in an adverse economic position. This line of argumentation has consistently never been entertained by the Commission with one surprising and inexplicable exception. The Commission and the Courts have repeatedly stated that to take account of the mere fact of an undertaking's difficult financial position due to general market conditions would be tantamount to conferring an unjustified competitive advantage on an undertaking.<sup>183</sup> Recently,

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<sup>177</sup> Commission decision of July 27 1994, *PVC II*, (1994) O.J. L 239/14; Commission decision of 21 December 1988, *PVC I*, (1989) O.J. L 74/1; Commission decision of April 23 1986, *Polypropylene*, (1986) O.J. L 230/1; Commission decision of 24 July 1969, *Dyestuffs*, (1969) O.J. L 195/11.

<sup>178</sup> Judgment of the European Court of First Instance, Case T-352/94, *Mo och Domsjö v. Commission*, [1998] E.C.R. II-1989, para 421.

<sup>179</sup> See Commission decision of 4 July 1984, *Synthetic Fibres*, (1984) O.J. L 207/17 and Commission decision of 29 April 1994, *Stichting Baksteen*, (1994) O.J. L 131/15.

<sup>180</sup> See para 197 of *Graphite Electrodes*, supra note 141, where the Commission stated "It has to be made clear that, in attempting to cope with difficult market conditions or falls in demand, undertakings must use only means that are consistent with the competition rules. Price fixing and market sharing are certainly not legitimate means of combating difficult market conditions. Nor are undertakings entitled to flout Community competition rules because of alleged overcapacity".

<sup>181</sup> The particularly critical economic situation of the sector only applied at the very beginning of the concerted action. Though the parties advanced the "Industry in Crisis" argument in the Carbonless Paper cartel, evidence before the Commission demonstrated otherwise as a result of which the argument was thrown out.

<sup>182</sup> Commission decision of 27 November 2002, *Methylglucamine*, (2004) O.J. L 38/18.

<sup>183</sup> See *Carbonless Paper*, supra note 59 and see Judgment of the European Court of Justice, Joined Cases C 96 – 102, 104, 105 108 and 110/82, *NV IAZ International Belgium v. Commission*, [1983] E.C.R. 3369 para. 55. In

however, this perfectly understandable line of reasoning was astonishingly jettisoned in *Specialty Graphites*. One of the companies received a 33% reduction as it was in financial difficulty through being found guilty of a different, yet contemporaneous, violation of competition law. Again the principles of impartiality and transparency have been ignored by the Commission. Further, it remains to be seen whether such a reduction is only possible where there are parallel proceedings in which case there is no recidivism. In such circumstances a company that has only transgressed the competition rules once could see itself more severely punished than a company that has been found in violation of the competition rules twice. This can hardly be justified when companies are fully aware that their (cartel) behaviour is contrary to the EC competition rules. Finally, within this context, the fact that a company has not benefited from the cartel will not be seen as an attenuating circumstance in the fixing of the fine.<sup>184</sup>

#### *Co-operation with the Commission*

Outside the framework of the leniency notice, which as mentioned only applies to cartels, undertakings are rewarded for any co-operation given to the Commission (found in 3 decisions). Though having been found to have abused its dominant position by implementing a system of loyalty-inducing rebates *Michelin* received a 20% reduction in the basic amount of the fine as it had put an end to the abuse before the Commission had sent its statement of objections. In *Organic Peroxides* cartel, Atochem was unable to fulfil the requirements of the leniency notice. It was substantially rewarded, however, in line with the principle of fairness, for the effective co-operation it gave outside the scope of the leniency notice for enabling the Commission to establish the full duration of the cartel.

#### *Termination of Infringement on Commission intervention*

In its 1998 Guidelines on fines, the Commission has indicated that it will reduce the basic amount of the fine when offenders terminate the infringement as soon as the Commission intervenes, and in particular when it carries out checks (found in 5 decisions). *Amino Acids* presents an interesting factual scenario under this heading. In the present case, the Commission carried out its first investigation on 11 and 12 June 1997. At that time, the undertakings concerned by the *Amino Acids* decision had already ended the infringement. However, the Commission considered that the end of the infringement was caused by the intervention of another authority (in this particular case the US FBI). In the US, the FBI searched the offices of ADM, Ajinomoto and Sewon in June 1995. The Commission therefore had no reason to believe that the undertakings concerned by the present decision continued the infringement beyond that date. The basic amount of the fine was therefore decreased by 10% for each undertaking in this cartel.

The *Vitamins* cartel decision lays down the principle whereby if an undertaking ends the infringement on its own initiative before the Commission intervenes, as Merck did in the case of the cartel in Vitamin C, this unilateral action by the undertaking cannot be construed as constituting an attenuating circumstance. In order to benefit from an attenuating circumstance the undertaking has to show that its voluntary action to terminate the infringement is directly linked to the Commission's action. The unilateral and independent cessation of an infringement will therefore only influence the duration of the infringement. Paradoxically,

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*Amino Acids*, Sewon, due to its loss-making financial situation was given the possibility to propose to the Commission acceptable periods for payment of the fine on condition that it demonstrates its inability to pay.

<sup>184</sup> *Carbonless Paper*, supra note 59.

therefore, it may seem that there are perverse incentives for a cartel to end anti-competitive conduct spontaneously. A company which puts an end to its anti-competitive conduct independent of the initiation of Commission investigation may be punished more severely than a cartel member that ends its anti-competitive conduct on the launching of a Commission investigation.<sup>185</sup> However, the concerns linked with this are largely assuaged by the ability for a cartel member to make use of the leniency programme. The Commission, however, will not entertain this attenuating circumstance where the anti-competitive conduct is particularly flagrant.<sup>186</sup>

### *Passive role*

The Commission will reduce the fine in circumstances where an undertaking is less culpable than another by playing a merely passive or “follow my leader” role (found in 6 decisions). This attenuating factor is interpreted very strictly, however. With respect to cartels, in order for an undertaking to find reprieve under this heading it must not have participated in any of the cartel meetings. In *Graphite Electrodes*, C/G only played a passive role in the infringement by not attending any of the cartel meetings such as the “Top Guy” meeting. It also adopted the position of a “price follower”. These mitigating circumstances therefore merited a reduction of 40% of the basic amount of the fine. Similarly in *Vitamins*, as Rhone Poulenc had not attended any of the cartel meetings, it received a reduction of 50% under this heading. The Commission in both *Graphite Electrodes* and *Vitamins* dismissed the passive players’ arguments that they had acted under economic pressure from the other co-conspirators making the riposte that even if it were correct that other producers put pressure on them it remained their own decision and responsibility to participate in the infringement and that they should have, in any event, informed the Commission of the illegal behaviour of their competitors in order to put an end to it.

Interestingly, in the *Amino Acids* decision, the Commission, when assessing the role played by the individual undertakings involved in the cartel divided the undertakings up depending on whether the parties played a leading, active or exclusively passive role. Apart from the two leaders all the other members were deemed to have played an active role in the cartel. Sewon was, however, held to have become a passive player with regard to the element of the cartel concerning sales quantities as it had ceased at a given point in time to inform the other producers on its sales quantities. Sewon therefore saw its fine reduced by 20%.

### *Existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement*

Prior to the promulgation of the 1998 Guidelines, this circumstance may have led to the non-imposition of a fine.<sup>187</sup> With the development of EC law and greater awareness of the competition rules on the part of undertakings, however, reasonable doubt as to whether the restrictive agreement constitutes an infringement holds less water with the Commission, this circumstance therefore being relegated to a mitigating circumstance (found in 3 decisions).

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<sup>185</sup> J.F. Bellis, *supra* note 66, p. 385.

<sup>186</sup> See *Plasterboard*, *supra* note 145.

<sup>187</sup> See for example, Commission decision of 19 April 1977, *ABG Oil Companies*, (1977) O.J. L 117/1. In this case concerning Article 82 EC, BP was held to have abused its dominant position through refusing to deal during the oil crisis of the early seventies. As the intervention of a public body may have created doubts on the part of those companies as to the obligations which they owed to their customers and the confusion which reigned on the Dutch Petroleum market, because of the uncertainty as to how the crisis might develop, this made it difficult to assess the reductions in delivery that were needed. Therefore no fine was imposed.

*Greek Ferries* provides an insight as to under which circumstances may be taken into account under this heading. The Commission considered in this case that the usual practice - not directly imposed by the legal or regulatory framework - of fixing domestic fares in Greece through a consultation of all domestic operators (whereby they were expected to submit a common proposal) and the ex-post decision of the Ministry for the Merchant Navy may have created some doubt among the Greek companies operating also on domestic routes as to whether price fixing consultation for the international route did indeed constitute an infringement. These considerations justified a reduction of the fines by 15% for all the undertakings privy to the cartel agreement.

In *Luxemburg Brewers* the Commission was mindful of the fact that the Luxemburg case law, which raised questions about the validity of certain beer ties, may have created doubts at the time the agreement was concluded about whether the restrictions relating to the mutual observance of beer ties constituted an infringement. The fines on each undertaking were therefore reduced by 20%. Why the two abovementioned cartels were treated differently with regard to the same mitigating circumstance is not fully clear in the Commission decisions. Again the Commission has failed to live up to its endeavour to render decisions more impartial and transparent.

In *Belgian Architects*, it was considered that the Belgian Architect's Association minimum fee scale infringed Article 81(1).<sup>188</sup> The Commission, however, deemed it plausible that there was reasonable doubt on the part of the Association as to whether its fee scale of 1967 did indeed constitute an infringement at least until the Commission adopted in 1993 its *CNSD* decision prohibiting the fixed fee scale of the Italian customs agents.<sup>189</sup> On account of this attenuating circumstance, the Commission considered it appropriate to remove the increase imposed for duration until 1993.

#### *Compensation Given to Third Parties*

The Commission is also receptive to undertakings themselves taking the initiative or at the instigation of the Commission to rectify any harm caused to undertakings through anti-competitive behaviour (found in 2 decisions). Subsequent to its decision to collaborate and at the instigation of the Commission, *Nintendo* offered substantial financial compensation to third parties which had suffered financial harm at the hand of Nintendo's anti-competitive practices. In recognition of this element, Nintendo was granted a reduction of €300.000. In the *Pre-insulated Pipes* cartel, the orchestrator (ABB) of the cartel received a € 5 million reduction from the basic amount as it had provided financial compensation to a third party (Powerpipe), and its previous owner, which had suffered at the hands of ABB's anti-competitive behaviour.

#### *Non-Implementation of anti-competitive agreement*

The scope of the section of the 1998 Guidelines concerning "non-implementation in practice of agreements," was defined as not covering cases where a cartel as a whole is not implemented but rather refers to the individual conduct of each undertaking.<sup>190</sup> This

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<sup>188</sup> Commission decision of 24 June 2004, *Belgian Architects*, not yet published in Official Journal but on Europa website..

<sup>189</sup> Commission decision of 30 June 1993, *CNSD*, (1993) O.J. L 203/27.

<sup>190</sup> Judgment of the Court of First Instance, *Archer Daniels Midland*, supra note 68, para. 264.

attenuating circumstance is also interpreted very strictly by the Commission (found in 2 decisions). In *Vitamins*, the Commission noted that the fact that an undertaking which has been proved to have participated in collusion on prices with its competitors is not necessarily a matter which must be taken into account as a mitigating circumstance. Following the reasoning of the CFI in its judgment *Cascades*,<sup>191</sup> the Commission stated that an undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its benefit. No parties were able to take advantage of this attenuating circumstance in the *Vitamins* decision.

One decision in which this attenuating circumstance was of assistance to a cartel member was *Graphite Electrodes*. Apart from only playing a passive role in the cartel, C/G was granted a further reduction on the basis of its partial non-implementation of the offending agreements. Between 1993 and 1996 C/G actually increased its sales in Europe, thereby not respecting the basic principle of the cartel of restricting sales in “non-home” markets. The Commission in *Organic Peroxides* stated that as deviations (cheating) from cartel agreements are a frequent feature of cartels, occasional or temporary non-implementation of certain parts of the overall agreement must not be seen as attenuating circumstances. It held further that as long as deviations remain limited in time and in importance, corrective measures such as retaliatory deviations, compensations or subcontracting often restore the overall agreed quotas prices. This attenuating circumstance is therefore very difficult to prove for an undertaking.

### *Jurisdiction of the Sector-Specific Regulator*

This mitigating circumstances represents one of less common factors taken into account by the Commission (found in only 1 decision thus far). In *Deutsche Telekom*, concerning Deutsche Telekom’s unfair prices charged to competitors and end-users for access to its local networks, the Commission took into consideration, in favour of Deutsche Telekom, that the retail and wholesale charges in question in the current proceeding were subject to sector specific regulation since 1988 on national level until the date of the decision. Deutsche Telekom had argued that its conduct was unimpeachable under the EC competition rules as its tariffs had previously been approved by the German telecommunications regulator. The Commission stated, however, that “the competition rules may apply where the sector specific regulation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition”.<sup>192</sup> Deutsche Telekom was therefore landed with a € 12.6 million fine for its abuse of a dominant position. The fact, however, that there had been a regulatory remedy meant that Deutsche Telekom received a 10% reduction in fines as a mitigating circumstance.<sup>193</sup>

## 3. Leniency

### 3.1 Section B

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<sup>191</sup> Judgment of the European Court of First Instance, Case T-308/94, *Cascades v. Commission*, [1998] E.C.R. II-925.

<sup>192</sup> See paragraph 54 of the decision.

<sup>193</sup> For a criticism of *Deutsche Telekom* and for a general discussion on the interface between competition authorities and regulatory agencies, see N. Petit, “The Proliferation of National Regulatory Authorities besides Competition Authorities: A Source of Jurisdictional Confusion?”, Global Competition Law Centre Working Paper 02/04 (2004).

Under the old notice, total immunity was offered on quite a few occasions (Section B was applied in 10 decisions). The first company to receive a 100% reduction in fines was Rhone Poulenc (Aventis) in the *Vitamins* cartel. It was the first to deduce “decisive evidence” on the cartel concerning the Vitamin A and E markets and fulfilled all the other conditions for immunity.<sup>194</sup> Aventis was again involved in the *Methionine* cartel where it also received full immunity from the Commission, somewhat hesitantly, however.<sup>195</sup> Brasserie de Luxembourg in *Luxembourg Brewers* also received total immunity from fines. It was initially fined €2.4 million but received immunity as it met all the requirements of section B.<sup>196</sup> Sappi also received immunity for the valuable information and cooperation provided in *Carbonless Paper*. Sappi provided information which consisted essentially of minutes of cartel meetings and employee statements on the functioning of the cartel (including descriptions of cartel meetings, persons present and agreements reached).

Total immunity was also granted in further cases such as, *Auction Houses*,<sup>197</sup> *Methylglucamine*, *Speciality Graphites* and *Nucleotides*. In *Nucleotides*,<sup>198</sup> despite there being elements in the Commission’s file indicating that Takeda may have played, on certain occasions, a coordinating role in the cartel, Takeda did not compel any other enterprise to take part in the cartel and did not act as an instigator in the cartel nor did it play a determining role in the illegal activity in the sense of the leniency notice. Takeda, in fulfilling all the requisite elements of Section B therefore received a 100% reduction in fines.

Companies that were granted a very substantial degree of reduction in fines under section B were Fujisawa (80%) in the *Sodium Gluconate*,<sup>199</sup> and Cerestar in *Citric Acid* (90%). Fujisawa could not receive immunity, as it did not come forward with evidence until after it had received a request for information. Cerestar was the first to co-operate and to provide detailed information on the cartel before the Commission had undertaken any investigation ordered by decision but as it approached the Commission only after it received the request for information and was therefore not entirely spontaneous. It could not therefore receive immunity from fines.

### 3.2 Section C

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<sup>194</sup> Only after learning that Aventis had voluntarily offered to cooperate with the United States Department of Justice, did Roche and BASF rush to offer co-operation with the European Commission.

<sup>195</sup> The Commission noted that Aventis’ statements were not comprehensive as to the operation of the cartel during the 1980s. The Commission acknowledged, however, that this could be explained by an incomplete recollection of events by Aventis.

<sup>196</sup> In the EC, the Commission’s investigation in the *Luxemburg Breweries* cartel arose as a result of Interbrew, disclosing its existence during the Commission’s investigation of the *Interbrew/Alken Maes* case. In this case Interbrew received no increased reduction in fines as a result of this extra information, and it would seem that this act of munificence on the part of Interbrew represents an anomaly in that cases like this would not happen very often unless there is a financial incentive in the form of a “two for one” programme, M. Jephcott, “The European Commission’s New Leniency Notice-Whistling the Right Tune?”, (2002) 23 *E.C.L.R.* 384. Unfortunately, unlike in the UK or US, the Commission may have squandered an opportunity in its revised notice by not introducing a 2-1 programme: An enterprise co-operating with an investigation in relation to cartel activity in one market (the “first market”) may also be involved in a separate cartel in another market (the “second market”). If the enterprise is granted complete immunity concerning its activities in the second market, it will also receive a reduction in fines imposed on it, which is additional to the reduction, which it would have received for its co-operation in the first market alone.

<sup>197</sup> Commission decision of 30 October 2002, *Fine Art Auction Houses*, not yet published in Official Journal but on Europa website.

<sup>198</sup> Commission decision of 17 December 2002, *Nucleotides*, (2004) L 75/1.

<sup>199</sup> Commission Press Release IP/01/1355 of 19 March 2002, “Commission fines five companies in sodium gluconate cartel”.

Section C was applied the least frequently during the existence of the 1996 leniency notice (applied in 1 decision). The first and only time a substantial reduction of a fine was granted by the Commission was in *Graphite Electrodes*, where Showa Denko was accorded a 70% reduction in fines, as it was the first company to actually furnish the Commission with substantial and “decisive evidence” of the cartel. Several very important documents, such as price lists, were handed over to the Commission, which constituted crucial evidence establishing the facts on which the decision was based. Showa Denko therefore received a final fine of € 17.4 million.<sup>200</sup>

### 3.3 Section D

The application of the 1996 leniency notice has been the most frequent with regard to section D (found in 24 decisions). Alloy Surcharge was the first case in which the Commission applied the 1996 leniency notice. No firms qualified for a reduction in fines under section B as none of them reported the agreement to the Commission before it commenced its investigations or even before it had sent its statement of objections. Nor did any of them receive a reduction under section C. Two firms in this cartel, Avesta and Usinor, admitted to the existence of a cartel and finally received a 40% reduction in fines. In *British Sugar*, the Commission accorded Tate & Lyle only a 50% reduction under section D instead of granting lenient treatment under section B. The Commission was of the view that Tate & Lyle did not maintain continuous and complete co-operation with the Commission as it had retracted statements which it had made earlier during the proceeding. In the *Pre-insulated pipes* cartel, ABB as the ringleader and instigator was automatically disqualified from receiving immunity. Nevertheless it did provide valuable information, in the form of documents describing the origin of the cartel, which assisted materially in the establishment of the relevant facts.<sup>201</sup> ABB could not receive the maximum reduction under section D in fines as ABB’s co-operation only came after the Commission had sent it detailed requests for information. ABB therefore received a 30% reduction in fines.

In *Zinc Phosphate*, all the parties to the cartel received leniency under section D with reductions varying from 50% to 10%. One of the parties received 50% as the list of the cartel meetings, inter alia, handed over to the Commission allowed it to form a clearer idea of the history and mechanisms of the cartel. Further, the explanations given enabled the Commission to send to the other cartel participants very detailed requests for information. Another party in *Zinc Phosphate* received only a 10% reduction for not contesting the facts as set out in the Statement of Objections. More recently, in *Industrial Tubes* all of the parties to the cartel benefited from section D.<sup>202</sup> As Outokumpu co-operated the earliest it received the most generous reduction which came to 50%.

The Commission can be criticised for the inconsistent application of section D, however. For example, Dalmine in the *Seamless Steel Tubes* and Strintzis in *Greek Ferries* were awarded a 20% reduction in fines for not contesting the facts on which the Commission based its allegations. In other instances, companies such as James Brown in *Zinc Phosphate* were

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<sup>200</sup> It is of note that although Showa Denko was the first company to co-operate with the Commission it nevertheless received a high fine. This is probably a result of the fact that the Commission takes worldwide turnover into account instead of the “volume of commerce in the industry” to which the cartel behaviour pertains.

<sup>201</sup> ABB handed over documents which, for example, described the origins of the cartel.

<sup>202</sup> Commission decision of 16 December 2003, *Industrial Tubes*, (2004) O.J. L 125/50.

accorded only 10% for not contesting the facts. Why the Commission awarded different reductions for the same co-operation is not clear from the decisions. Concerning the issue of a discrepancy in fines and the value of the co-operation provided by a leniency applicant, however, the CFI has clarified that the Commission is able to award different reductions in fines to different leniency applicants under section D according to the value of the undertaking's co-operation.<sup>203</sup> It further stated that the award of different reductions under the same section is not a breach of the equal treatment principle.<sup>204</sup>

## V. Judicial Review of Decisions Post Introduction of the 1998 Guidelines.

Pursuant to Article 229 EC and Article 17 of Regulation 17/62 (now Article 31 of Regulation 1/2003), the CFI and the ECJ have unfettered powers to annul, reduce or increase the fines.<sup>205</sup> To date, however, the CFI has never increased the fines imposed by the Commission. Whilst the CFI may therefore have full jurisdiction to review Commission fines, it essentially restrains itself to assessing whether the factors linked to duration and gravity, leniency and methodology have been correctly applied. The CFI does not repeat the whole assessment process, it solely reviews it in relation to a defendant's objections which relate to its level of responsibility and degree of participation in the transgression of the law and the principle of proportionality.<sup>206</sup> Since the introduction of the 1998 Guidelines, the CFI has reduced fines which the Commission has imposed in 32 cases. From the empirical evidence it can be deduced that in over 50% of the judgments rendered, where the CFI has lowered the fine, the fine has been reduced by between 7% and 25%. In Graph 3, we also provide a visual illustration of the amounts of the aggregated level of fines imposed by the between 1998 and 2001 and the reduction of the aggregated level of such fines by the CFI. The Commission fines and attendant CFI reductions in the following graph relate only to the appellants stemming from the Commission decision in each given year. For sake of clarity the following number of appellants and the concomitant fines imposed on them by the Commission/CFI in each respective year are: 1998-9 appellants, - Commission fine = €198.980.000, CFI fine = €169.461.000; 1999-6 appellants, - Commission fine = €77.400.000, CFI fine = €65.520.000; 2000-6 appellants, - Commission fine = €157.946.000, CFI fine = €126.458.000; 2001-7 appellants, - Commission fine = €207.200.000, CFI fine = €152.732.

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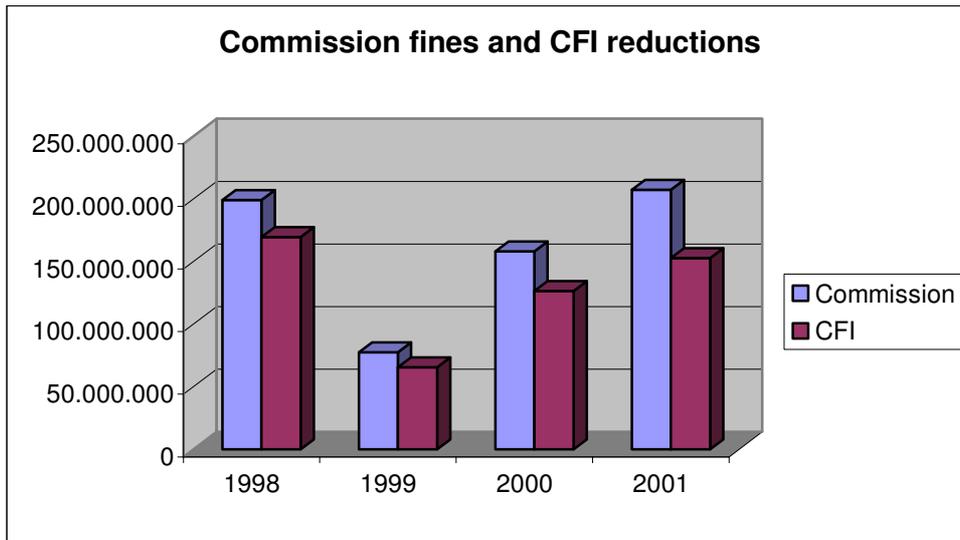
<sup>203</sup> Judgment of the European Court of First Instance, Case T-21/99, *Dansk Rørindustri v. Commission*, [2002] E.C.R. II-1681, para. 245.

<sup>204</sup> Judgment of the European Court of First Instance, Case T-45/98 and T-47/98, *Krupp Thyssen Stainless GmbH and Acciali speciali Terni SpA v Commission*, [2001] E.C.R. II-3757.

<sup>205</sup> The CFI in Case T-368/00, *General Motors Nederland and Opel Nederland v. Commission*, nyp, stated "the guidelines do not prejudice the assessment of the fine by the Community judicature", para. 188. As a result of that unlimited jurisdiction, the CFI, when amending the contested measure by changing the amount of the fines imposed by the Commission, must take account of all the relevant factual circumstances see Joined cases C-238-99 P, C-245/99 P, C-247/99 P; C250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission*, [2002] E.C.R. I-8375, para. 692.

<sup>206</sup> See L. Ritter and W.D. Braun, *European Competition Law: A Practitioner's Guide*, Kluwer Law International, 3<sup>rd</sup> Ed., The Hague, 2004, p. 1132. In its assessment of the appropriateness of a fine the CFI may independently of any manifest errors of assessment made by the Commission, justify the production and taking into account of additional information which is not mentioned in the Commission decision, Judgment of the European Court of Justice, Case C-297/98, *SCA Holding v. Commission*, [2000] E.C.R. I-10101, para. 55.

Graph 3



In this part, we also examine the factors taken into account by the CFI when it reduces the fines imposed by the Commission for breaches of Articles 81 and 82 EC.<sup>207</sup> These factors are summarized in Table 3, which comprises several columns indicating: (i) the initial amount of the fine imposed by the Commission; (ii) the amount of the fine as reduced by the CFI; and (iii) a survey of eight different factors, which have been taken into account by the CFI as a basis for reducing the fines imposed by the Commission.

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<sup>207</sup> We do not assess the ECJ judgments as the fines in Commission decisions subsequent to the introduction of the Guidelines have not been reduced yet by the ECJ.

Table 3

Case No.	Appellant	Commission Decision	Comm. Fine €	CFI Fine €	Factors taken into account in reducing the fine									
					1	2	3	4	5	6	7	8	9	
T-45/98	KTN	Alloy Surcharge	8.100.000	4.032.000			x	x						
T-47/98	AST	Alloy Surcharge	4.540.000	4.032.000			x							
T-62/98	VW	VW Audi	102.000.000	90.000.000	x									
T-202/98	Tate & Lyle	British Sugar	7.000.000	5.600.000			x							
T-191/98, T-212/98 to T-214/98	TACA	TACA	272.980.000	0								x		
T-9/99	HFB KG & HFB GmbH	Pre-Insulated Pipes	4.950.000	0				x						
T-28/99	Sigma	Pre-Insulated Pipes	400.000	300.000		x								
T-31/99	ABB	Pre-Insulated Pipes	70.000.000	65.000.000			x							
T-213/00	FETTCSA	FETTCSA	6.932.000	0					x					
T-224/00	ADM	Amino Acids	47.300.000	43.875.000						x	x			
T-230/00	Daesang Corp & Sewon	Amino Acids	8.900.000	7.128.000			x			x				
T-220/00	Cheil Jedang Corp	Amino Acids	12.200.000	10.080.000								x		
T-368/00	Opel	Opel	43.000.000	35.475.000		x								
T-59/99	Ventouris	Greek Ferries	1.010.000	252.500		x								
T-61/99	Adriatica	Greek Ferries	980.000	245.000		x								
T-67/01	JCB	JCB	39.614.000	30.000.000									x	x
T-48/00	Corus	Seamless Steel Tubes	12.600.000	11.700.000	x									
T-50/00	Dalmine	Seamless Steel Tubes	10.800.000	10.080.000	x									
T-67/00	JFE	Seamless Steel Tubes	13.500.000	10.935.000	x	x								
T-68/00	Nippon Steel	Seamless Steel Tubes	13.500.000	10.935.000	x	x								
T-71/00	JFE Steel	Seamless Steel Tubes	13.500.000	10.935.000	x	x								
T-78/00	Sumitomo	Seamless Steel Tubes	13.500.000	10.935.000	x	x								
T-236/01	Tokai	Graphite Electrodes	24.500.000	12.276.000							x			
T-239/01	SGL	Graphite Electrodes	80.200.000	69.114.000			x							
T-244/01	Nippon	Graphite Electrodes	12.200.000	6.274.400			x				x			
T-245/01	SDK	Graphite Electrodes	17.400.000	10.440.000							x			
T-246/01	UCAR	Graphite Electrodes	50.400.000	42.050.000			x							
T-251/01	SEC	Graphite Electrodes	12.200.000	6.138.000							x			
T-252/01	C/G	Graphite Electrodes	10.300.000	6.480.000			x				x			

1 = Incorrect assessment of duration of infringement, 2 = Incorrect assessment of gravity of infringement, 3 = Incorrect application of leniency notice, 4 = Wrongful imputation of unlawful conduct, 5 = Expiry of limitation period for the imposition of fines, 6 = Incorrect method employed in calculating fines, 7 = Incorrect assessment of mitigating circumstances, 8 = Incorrect assessment of aggravating circumstances, 9= Failure to establish infringement

#### A. Incorrect Assessment of the Duration of the Infringement

This factor has been used frequently by the CFI in order to reduce a Commission fine (found in 7 judgments).<sup>208</sup> The *Seamless Steel Tubes* cartel involving European producers (Mannesmannroehren-Werke, Vallourec SA, British Steel Ltd and Dalmine SpA) and several Japanese producers (Sumitomo, Nippon Steel, NKK Corporation, Kawasaki Steel Corporation) represents an interesting factual scenario under this heading. In 1972, as part of the anti-crisis measures it had adopted, the Commission concluded with the Japanese Government an agreement on the voluntary restraint of exports of seamless steel tubes. In response to the request from the Japanese Ministry of International Trade and Industry (hereinafter, “MITI”), Sumitomo, Nippon Steel, NKK and Kawasaki Steel Corporation concluded a quota agreement in 1975 for exports of steel products to the Community. In 1978, as a back up measure to the 1977 anti-crisis plan, the Commission adopted an agreement with MITI with a view to establishing price discipline that would prevent disruption of the Community market and thus ensure the preservation of traditional trade patterns. The agreement provided that both parties should endeavour to avoid disturbance in the markets for iron and steel products of first stage processing (including pipes and tubes). The 1978 agreement was extended until 1987. As part of an arrangement between the Commission and MITI, the authorisation granted by MITI to the quota agreement concluded by the Japanese was renewed until 1990. As a result of the voluntary restraint of exports agreed between the Commission and the Japanese Government the Commission only found a market sharing agreement, concluded at meetings of the companies known as the “Europe-Japan Club”, between the abovementioned Japanese companies and European producers from 1990 until 1995.<sup>209</sup> The Commission was also of the opinion that the European producers had concluded anti-competitive contracts concerning sales of pipes on the UK market. No additional fines were imposed on the European producers for this, however, as the contracts relating to the UK market were seen as merely a means of ensuring the application of the “Europe-Japan Club” agreements.

The CFI stated that the time at which the voluntary restraint agreements are said to have come to an end was the decisive criterion for assessing whether the market sharing agreement between the European and Japanese producers should be deemed to have started in 1990.<sup>210</sup> The Commission in this case was unable to provide documentary evidence in its archives recording the date of cessation of those agreements. Relying on evidence furnished by the Japanese producers, however, which stated that the voluntary restraint agreements were

<sup>208</sup> This factor has been taken into account in Judgment of the European Court of First Instance, Case T-62/98, *Volkswagen AG. v. Commission*, [2000] E.C.R. II-2707; Judgment of the European Court of First Instance, Case T-48/00, *Corus UK Ltd. v. Commission*, nyp; Judgment of the European Court of First Instance, Case T-50/00, *Dalmine v. Commission*, nyp; Judgment of the European Court of First Instance, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE, Nippon Steel, JFE Steel and Sumitomo v. Commission*, nyp.

<sup>209</sup> For British Steel (*Corus*) the infringement was deemed to have lasted only until 1994.

<sup>210</sup> Judgment of the European Court of First Instance, Case T-48/00, *Corus UK Ltd v. Commission*, nyp, para. 124; Judgment of the European Court of First Instance, Case T-50/00, *Dalmine v. Commission*, nyp; Judgment of the European Court of First Instance, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE, Nippon Steel, JFE Steel and Sumitomo v. Commission*, nyp.

renewed until 31 December 1991, the CFI reduced the duration of the infringement found by the Commission by one year and reduced the fines imposed on the Japanese and European producers (Dalmine and Corus) accordingly.<sup>211</sup> With regard to the date on which the infringement came to an end the CFI found that the Commission's evidence did not corroborate a finding that the infringement lasted until 1995 and reduced the duration of the infringement by the Japanese producers by a further six months.<sup>212</sup>

#### B. Incorrect Assessment of Gravity of the Infringement

Many of the fines imposed by the Commission have been reduced under this heading (found in 8 judgments).<sup>213</sup> The *Lysine* judgments, which follow the Commission's *Amino Acids* decision, shed some light on how the Commission should assess the gravity of an infringement.<sup>214</sup> In the *Lysine* judgments the CFI reiterated that it is for the Commission, in the exercise of its discretion and in the light of the terms of the 1998 Guidelines, to determine whether the circumstances of the case before it enable it to classify the infringement as very serious.<sup>215</sup> Within this context, the CFI reiterated that the actual effect of the infringement on the relevant market and the "the actual conduct which an [undertaking] claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market, account must only be taken of the effects resulting from the infringement as a whole".<sup>216</sup> In assessing the actual effect of the infringement the Commission was to "take as a reference the competition that would normally exist if there were no infringement".

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<sup>211</sup> In this regard the CFI stated "Although, in general, an applicant cannot transfer the burden of proof to the defendant by invoking circumstances which it is not in a position to establish, the concept of burden of proof cannot be applied for the benefit of the Commission in this case with regard to the date of cessation of the international agreements concluded by it. The Commission's inexplicable inability to produce evidence relating to a circumstance which concerns it directly makes it impossible for the Court to give a ruling in full knowledge of the facts concerning the date of cessation of those agreements. It would be contrary to the principle of sound administration of justice to cause the consequences of that inability on the part of the Commission to be borne by the addressees of the contested decision which, in contrast to the defendant institution, were not in a position to produce the missing evidence. In those circumstances, it must be considered by way of exception, that it was incumbent on the Commission to produce evidence of the date of cessation of the voluntary restraint agreements", see *id.*, paras. 343-344 of Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 and paras. 125 and 308 of Case T-48/00 Case T-50/00 respectively.

<sup>212</sup> *Id.*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00.

<sup>213</sup> The fine was reduced under the heading of gravity in Judgment of the European Court of First Instance, Case T-28/99, *Sigma Technologie di Rivestimento Srl v. Commission*, [2002] E.C.R. II-1845. Judgment of the European Court of First Instance, Case T-368/00, *General Motors Nederland and Opel Nederland v. Commission*, nyp; Judgment of the European Court of First Instance, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE, Nippon Steel, JFE Steel and Sumitomo v. Commission*, nyp; Judgment of the European Court of First Instance, Case T-59/99, *Ventouris v. Commission*, nyp and Judgment of the European Court of First Instance, Case T-61/99, *Adriatica di Navigazione v. Commission*, nyp. With regard to *Ventouris* and *Adriatica*, the CFI held that as the Commission had, in its decision, sanctioned two distinct infringements, it could not for reasons of equity and proportionality penalise with the same severity the undertakings which were found to have only been involved in one infringement and those which had been involved in two cartels.

<sup>214</sup> Judgment of the European Court of First Instance, Case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission*, [2003] E.C.R. II-2597, Judgment of the European Court of First Instance, Case T-230/00, *Daesang Corp. and Sewon Europe v. Commission*, [2003] E.C.R. II-2733, Judgment of the European Court of First Instance, *Cheil Jedang Corp. v. Commission*, [2003] E.C.R. II-2473.

<sup>215</sup> See, for example, *id.* *Archer Daniels Midland*, para. 129

<sup>216</sup> In *Archer Daniels Midland*, the CFI stated that in order to establish that pricing agreements have had an effect, the Commission must find that they have in fact allowed the undertakings concerned to achieve levels of transaction price higher than that which would have prevailed had there been no cartel and take into account all the objective conditions in the relevant market, having regard to the economic context and legislative background, para. 150-151.

In the *Seamless Steel Tubes* cartel decision, the Commission's assessment of the relationship between the alleged infringements made at the level of the "Europe-Japan Club" and the agreements made only between the four European producers in relation to the UK market was challenged by the Japanese companies. The CFI held that by omitting to take account of the infringement between the four European producers in determining the fine imposed on the European producers, the Commission treated different situations in the same way but without relying on objective reasons capable of justifying that approach. The CFI therefore held that the most suitable way of remedying the unequal treatment for the purpose of determining the amount of the fine imposed on each of the Japanese applicants was to reduce the amount decided on by the Commission in respect of the gravity of the infringement from €10 million to €9 million.<sup>217</sup> Logically, one may suppose that the fine should have been increased for the European producers. Despite the Commission requesting the CFI to increase the fines imposed on the European producers, the CFI held that as the Commission had not pleaded in its defence in the cases concerning the European producers, or even belatedly at the hearing, that the fines should be revised upwards for the European producers, a reduced fine on the Japanese producers was more appropriate in the circumstances.

It is settled case law that an undertaking which has taken part in a multi-form infringement of the EC competition rules through its own conduct, which is held to be an agreement having an anti-competitive object within the meaning of Article 81 EC and was intended to help bring about the infringement as a whole, may in addition also be held responsible for the behaviour of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement. This is so where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk.<sup>218</sup> In a judgment stemming from the *Pre-insulated Pipes* decision, the CFI held that the Commission had properly established the allegations concerning Sigma Technologie's participation in an illegal sales quota agreement on the Italian market.<sup>219</sup> The Commission did not show, however, that Sigma Technologie, when participating in the illegal agreement on the Italian market, was aware of the anti-competitive conduct at European level of the other undertakings, or that it could reasonably have foreseen such conduct. The CFI therefore reduced the fine imposed on Sigma Technologie to €300,000 from €400,000 on the ground that it only operated on the Italian market and not on the whole of the Common Market.

### C. Expiry of Limitation Period for the imposition of fines

This is one of the least common factors taken into account by the CFI when reducing Commission fines (found only in one judgment thus far). The CFI observed in *CMA CGM and Others v. Commission*,<sup>220</sup> which involved litigation pursuant to the *FETTCSA* decision involving an agreement not to discount from published tariffs for liner shipping services,<sup>221</sup> that it is a general principle of Community law, related to the principle of sound administration, that the Commission is obliged to act within a reasonable time when adopting decisions following administrative procedures relating to competition policy. As a

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<sup>217</sup> Supra note 208, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00.

<sup>218</sup> Judgment of the European Court of Justice, Case C-49/92 P, *Commission v. Anic Partecipazioni*, [1999] E.C.R. I-4125, para.203.

<sup>219</sup> Judgment of the European Court of First Instance, Case T-28/99, *Sigma Technologie di Rivestimento Srl v. Commission*, [2002] E.C.R. II-1845.

<sup>220</sup> Judgment of the European Court of Justice, Case T-213/00, *CMA CGM v. Commission*, [2003] E.C.R. II-913.

<sup>221</sup> Commission decision of 16 May 2000, *FETTCSA*, (2000) O.J. L 268/1

consequence of this, the Commission is not permitted to defer its position indefinitely and, in the interests of legal certainty and of ensuring adequate judicial protection, the Commission is required to adopt a decision or to send a formal letter, if such a letter has been requested, within a reasonable time.<sup>222</sup> The CFI further stated that an unreasonable length of procedure, particularly where it infringes the rights of the defence of the parties concerned, justifies the annulment of a decision establishing an infringement of the competition rules.<sup>223</sup>

The CFI held in *CMA CGM* that the abovementioned principles do not apply where the amount of fines is disputed, as the Commission's remit to impose fines is covered by Regulation No. 2988/74,<sup>224</sup> which lays down a 5 year limitation period in such a situation. Regulation No. 2988/74 established an exhaustive set of rules covering in detail the periods within which the Commission may, without undermining the fundamental requirement of legal certainty, impose fines on undertakings which are the subject of procedures under the Community competition rules. The CFI held that in the light of those rules, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period. At the same time, however, the Commission is not precluded from exercising its discretion to reduce the fines for reasons pertaining to fairness, where it is of the opinion that the administrative procedure was too protracted, even though it ended within the limitation period.<sup>225</sup>

The CFI highlighted that the five year limitation period laid down in Regulation No. 2988/74 may be interrupted by a request for information under Article 11 of Regulation 17, provided that that request is necessary for the investigation or proceedings relating to the infringement. As the Commission in this particular case was unable to demonstrate the necessity of those requests, which meant that there was no interruption of the 5 year limitation period, the CFI found that the Commission had imposed fines on 16 May 2000 even though the five year limitation period, which had begun on 24 March 1995, had expired.<sup>226</sup> As a result the fines imposed in *FETTCSA* were reduced to zero.<sup>227</sup>

#### D. Incorrect application of leniency notice

This is the most prevalent factor taken into account by the CFI when reducing Commission fines (found in 11 judgments).<sup>228</sup> The level of reductions in fines granted by the Commission

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<sup>222</sup> Supra note 220, para. 317.

<sup>223</sup> Supra note 220, para. 321.

<sup>224</sup> Council Regulation (EEC) No. 2988/76 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (1974) O.J. L 319/1. This Regulation has now been codified in Regulation 1/2003, supra note 5, Articles 25 and 26.

<sup>225</sup> In this context, the Commission in *FETTCSA*, reduced its own fine as eight years had passed since the opening of the procedure and the adoption of the decision. In addition it is of interest to note that in the recent *Animal Feed* cartel decision, the five year limitation period for the adoption of fines had run out as regards the North American producers. The decision was, however, still addressed to them, in particular to warn them not to engage in such behaviour in the future, see Commission Press Release IP/04/1454 of 9 December 2004 "Commission imposes €66.34 million fines on animal feed vitamin cartel".

<sup>226</sup> The CFI further held that the five year limitation period may not be extended for a further five years by a request for information which has the sole purpose of prolonging the limitation period artificially, para. 488.

<sup>227</sup> See paras 317-326 and para 516-517 of case T-213/00. Related to the issue of time frames for bringing proceedings the CFI held in *TACA* that the written submission by the applicants were so long that they amounted to an abuse themselves. The applicants were therefore ordered to pay their own costs. Though there is no case law which limits the length of written pleadings the *TACA* may set a useful precedent.

<sup>228</sup> This factor also led to the reduction in fine in Judgment of the European Court of First Instance, Case T-45/98, *Krupp Thyssen Stainless v. Commission*, [2001] E.C.R. II3757 and Judgment of the European Court of

under the leniency notice has engendered much legal wrangling with many undertakings claiming that their co-operation justified a greater reduction in the fine. Next to reductions for incorrect assessments of duration and gravity this “card” has proved very successful in achieving a reduction in fines. The *Lysine* judgments intimate some guidelines on the application of the leniency notice. In the *Daesang* judgment,<sup>229</sup> involving one of the members of the *Amino Acids* cartel, the CFI reduced the fine on Daesang as the Commission had failed to apply the leniency notice correctly by granting a reduction under section D of the notice and not section C. The CFI further held that none of the reasons given by the Commission constituted a legal justification for this failure. It stated that, referring to previous case-law, co-operation in a Commission investigation into a possible infringement of the Community rules on competition, which does not go beyond that which undertakings are required to provide under Article 11 (4) and (5) of Regulation 17/62 does not justify a reduction in the fine. A reduction in the fine is, however, justified where an undertaking provides the Commission with information well in excess of that which the Commission may require under Article 11 of Regulation 17/62. The fact that a request for information has been addressed to the co-operating undertaking under Article 11 (1) of Regulation 17 cannot itself exclude the possibility of a substantial reduction of between 50% and 75% of the fine pursuant to section C of the leniency notice, particularly as a request for information is a less coercive measure than an investigation ordered by decision.<sup>230</sup>

In two judgments derived from the *Alloy Surcharge* decision,<sup>231</sup> the CFI deemed that the Commission had incorrectly granted lower reductions, under the leniency notice, to the applicants in comparison to the other parties to the cartel, on the basis that the information the applicants provided added nothing to the content of the submission previously handed to the Commission by the other parties. As the Commission had posed the same question simultaneously to all the companies involved in the *Alloy Surcharge* cartel, the CFI held that the extent of the co-operation provided by all the parties was to be seen as “comparable, in so far as those undertakings provided the Commission, at the same stage of the administrative procedure and in similar circumstances, with similar information concerning the conduct imputed to them”.<sup>232</sup> The CFI therefore held that the appraisal of the extent of any co-operation by a given undertaking cannot depend on random factors, such as the order in which they are questioned. In light of the fact that the differential treatment between the undertakings was not objectively justified the CFI reduced the fine on the applicants.

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First Instance, Case T-48/98, *Acerinox v. Commission*, [2001] E.C.R. II-3859; Judgment of the European Court of First Instance, Case T-202/98, *Tate & Lyle v. Commission*, [2001] E.C.R. II-2035; Judgment of the European Court of First Instance, Case T-230/00, *Daesang Corp. and Sewon Europe v. Commission*, [2003] E.C.R. II-2733; Judgment of the European Court of First Instance, Case T-31/99, *ABB Asea Brown Boveri Ltd. v. Commission*, [2002] E.C.R. II-1881; Judgment of the European Court of First Instance, Case T-239/01, *SGL Carbon v. Commission*, nyp; Judgment of the European Court of First Instance, Case T-244/01, *Nippon Carbon v. Commission*, nyp; Judgment of the European Court of First Instance, Case T-246/01, *UCAR v. Commission*; Judgment of the European Court of First Instance, Case T-251/01, *C/G v. Commission*, nyp; Judgment of the European Court of First Instance, Case 251/01, *SEC v. Commission*, nyp.

<sup>229</sup> See supra note

<sup>230</sup> See judgment *Daesang and Sewon v. Commission*, supra note 214.

<sup>231</sup> Judgment of the European Court of First Instance, Case T-45/98, *Krupp Thyssen Stainless v. Commission*, [2001] E.C.R. II3757 and Judgment of the European Court of First Instance, Case T-48/98, *Acerinox v. Commission*, [2001] E.C.R. II-3859.

<sup>232</sup> *Id.*, paras. 246 and 140 respectively.

Following the Commission's decision in *British Sugar*, Tate & Lyle received an increased reduction under the leniency notice before the CFI.<sup>233</sup> As mentioned above, the Commission deemed Tate & Lyle's co-operation as incomplete and discontinuous as it had allegedly retracted the admission of certain facts made earlier on in the procedure. The CFI found that Tate & Lyle had merely provided a different qualification of the facts rather than challenging the facts previously admitted or retracting statements made earlier. The CFI further laid down the principle that the Commission cannot establish a failure to co-operate on the basis that an undertaking contests an element of the infringement which the Commission has been unable to prove, this being so even if the inability to prove the infringement is the direct corollary of a retraction of facts previously admitted by an undertaking.<sup>234</sup>

#### E. Incorrect Assessment of Mitigating and Aggravating Circumstances

The long and complex *TACA* judgment provides an insight into how the Commission should have assessed the mitigating circumstances in its decision (found in 4 judgments).<sup>235</sup> The CFI set aside,<sup>236</sup> on the grounds of lack of evidence and infringement of the right of defence, the part of the decision relating to Article 82 infringements concerning inducements made to competitors to join the *TACA* conference. It is the first abuse which is of interest here (restrictions on the availability and content of service contracts), however. The CFI confirmed the finding of the Commission with regard to the first abuse except for the element concerning the exchange of information between companies in the conference, which the CFI did not consider abusive as that information had been published in the United States.

The CFI had to first examine whether the elements of the first abuse were covered by immunity from fines provided in Article 19 of Regulation 4056/86.<sup>237</sup> Since the abusive practices had been notified to the Commission therefore receiving immunity, the fines were annulled.<sup>238</sup> However, there was a part of the fines which could not benefit from immunity as the fines were imposed not exclusively under Regulation 4056/86 but also under Regulation 1017/68 relating to the inland part of the contracts for transport services.<sup>239</sup> It is in relation to this inland part that the Commission was held to have incorrectly assessed the mitigating circumstances. First, the CFI noted that the applicants had on their own initiative revealed the practices regarded by the Commission as constituting an abuse contrary to Article 82 EC. This point was all the more powerful as neither Regulation 4056/86 nor Regulation 1017/68

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<sup>233</sup> Judgment of the European Court of First Instance, Case T-202/98, *Tate & Lyle v. Commission*, [2001] E.C.R. II-2035.

<sup>234</sup> *Id.*, para. 161.

<sup>235</sup> This factor has been used to reduce the fine in Judgment of the European Court of First Instance, Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line AB and Others v. Commission*, nyp; Judgment of the European Court of First Instance, Case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission*, [2003] E.C.R. II-2597; Judgment of the European Court of First Instance, *Cheil Jedang Corp. v. Commission*, [2003] E.C.R. II-2473; Judgment of the European Court of First Instance, Case T-67/01, *JCB Service v. Commission*, nyp.

<sup>236</sup> Judgment of the European Court of First Instance, Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line AB and Others v. Commission*, nyp. For a good discussion of the judgment in its entirety see M. Jaspers, "The *TACA* Judgment: Lessons Learnt and the Way Forward", (2004) 1 *Competition Policy Newsletter* 34.

<sup>237</sup> Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (1986) O.J. L 378/4.

<sup>238</sup> The CFI also held that the Commission could not hand down fines for the Article 81 infringements (fixing of tariffs etc) because of notification.

<sup>239</sup> Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, (1968) O.J. L 175/1.

establish a system of compulsory notification for the grant of individual exemption, so that the applicants had notified the TACA on a voluntary basis. Second, *TACA* was the first decision in which the Commission directly assessed the lawfulness, in the light of the EC competition rules, of the practices on service contracts adopted by shipping conferences. Third, the CFI noted that the legal treatment that should be reserved for the practices of shipping conferences on service contracts was not devoid of complications and also raises complex legal issues. Fourth, the abuse resulting from the practices on service contracts did not constitute a classic abuse within the meaning of Article 82 EC. Finally, the members of the TACA were held to be justified in believing that the Commission would refrain from fining them in the light of previous case-law. These mitigating circumstances led the CFI to annulling the part concerning the first abuse in its entirety.

The CFI in the *Lysine* judgments held that, in light of the wording of the 1998 Guidelines, any percentage increases or reductions decided upon to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine set by reference to the gravity and duration of the infringement and *not* to the figure resulting from any initial increase or reduction to reflect aggravating or mitigating circumstances.<sup>240</sup> In the particular circumstances of the *Archer Daniels Midland* judgment, the CFI noted that when the Commission was assessing the aggravating and mitigating circumstances, the Commission had increased the basic amount (€39 million) by 50% but then gave a 10% for stopping when caught to the weighted figure of €58 million instead of the €39 million as stipulated in the 1998 Guidelines. The CFI held that the €5.85 million had to be deducted from the basic amount, not the weighted amount.

The CFI in its *JCB* judgment found that the Commission had both failed to establish an infringement and incorrectly assessed an aggravating circumstance.<sup>241</sup> With regards to the aggravating circumstance, the increased fine for taking retaliatory measures against another undertaking was inextricably linked to the application of a clause of a properly notified agreement which enjoys immunity from fines under Article 15 (5) of Regulation No. 17. The CFI therefore held that the Commission could not therefore increase the amount of the fine to take account of alleged aggravating circumstances.

#### F. Wrongful imputation of unlawful conduct

This factor has also been found in some of the CFI judgments where Commission fines have been reduced (found in 2 judgments).<sup>242</sup> In principle, it falls to the natural or legal person managing the undertaking in question at the time when the transgression of the EC competition rules was committed to answer for that infringement, even if, at the time of the decision finding the infringement, another person has assumed responsibility for operating the undertaking.<sup>243</sup> In *Stora Kopparbergslags v. Commission*, the CFI gave a new judgment after

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<sup>240</sup> See *Archer Daniels Midland*, supra note 214, para. 378.

<sup>241</sup> Judgment of the European Court of First Instance, Case T-67/01, *JCB Service v. Commission*, nyp. The infringement could not be established as regards three of its elements: the fixing of discounts and retail prices applicable by distributors established in the UK and in France, the imposition of service support fees on sales to other Member States made by distributors established outside the exclusive territories of the United Kingdom and the withdrawal of multiple deal trading support for certain geographical destinations of sales.

<sup>242</sup> This factor has been used to reduce fines in Judgment of the European Court of First Instance, Case T-45/98, *Krupp Thyssen Stainless v. Commission*, [2001] E.C.R. II3757 and in Judgment of the European Court of First Instance, Case T-9/99, *HFB and Others v. Commission*, [2002] E.C.R. II-1487.

<sup>243</sup> See Judgment of the European Court of Justice, Case C-279/98, *P Cascades v. Commission*, [2000] E.C.R. I-9693 para. 78 and Case C-297/98 P, *SCA Holding v. Commission*, [2000] E.C.R. I-10101 para. 27. See also

the case had been referred back to it by the judgment of the ECJ,<sup>244</sup> in which it held that the CFI had erred in law in ruling that Stora was liable for the conduct of two of the companies which it acquired during the infringement period. The ECJ found that the two companies had continued to exist after control of them had been acquired by Stora. The ECJ stated that what is pertinent for the application of the above rule is not the fact that the companies continued to exist after their acquisition by Stora, but the existence on the date of adoption of the Commission's decision, of the legal person responsible for their operation during the period prior to that acquisition. The CFI put a number of questions to Stora in order to determine whether or not that legal person had existed on the date of adoption of the Commission's decision. Since the applicant's replies indicated that that legal person had existed, the Court considered that the onus was on the Commission to provide evidence to the contrary. As the Commission was not able to do so the CFI therefore reduced the amount of the fine imposed on Stora.

*HFB and Others v. Commission* also arose from the Commission's *Pre-Insulated Pipes* decision,<sup>245</sup> in which the six companies which constituted the Henss/Isoplus group were held jointly and severally liable for all the anti-competitive acts of the group and for payment of the fine imposed. The CFI held that in the absence of a person at its head to which, as the person responsible for co-ordinating the group's activities, responsibility could have been imputed for the infringements committed by the various component companies of the group, the Commission was entitled to hold the component companies jointly and severally liable for all the acts of the group. This is so in order to ensure that the formal separation between those companies resulting from their separate legal personality, could not prevent a finding that they had acted jointly on the market for the purposes of applying the competition rules. The CFI then found that the Commission had incorrectly imputed responsibility for the infringement to two of the six companies (HFB GmbH and HFB KG) which made up the group at the date on which the decision was adopted, since those two companies had not yet come into existence at the time of the infringement. The CFI held that the situation would only be different where the legal person or persons responsible for running the undertaking have ceased to exist in law after the infringement has been committed. It was held that it was common ground that the companies concerned at the time when the infringement was committed still exist. The fines were therefore annulled as against these two entities.

#### G. Failure to establish infringement

This is also one of the least common factors taken into consideration by the CFI when reducing Commission fines (found only in one judgment thus far). The Commission in *JCB* had found that JCB Service and its subsidiaries had infringed Article 81 EC by entering into agreements or concerted practices with authorised distributors, the object of which was to restrict competition within the Common Market in order to partition national markets and provide absolute protection in exclusive territories in which authorised distributors were prevented from making active sales and which included the following: restrictions on passive sales by authorised dealers, restrictions on sources of supply, fixing of discounts or retail prices, the imposition of service support fees and the withdrawal of multiple deal trading

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Judgment of the European Court of First Instance, Case T-354/94, *Stora Kopparbergs Bergslags v. Commission*, [2002] ECR II-843.

<sup>244</sup> Judgment of the European Court of Justice, Case C-286/98 P, *Stora Kopparbergs Bergslags v. Commission* [2000] E.C.R. I-9925.

<sup>245</sup> Judgment of the European Court of First Instance, Case T-9/99, *HFB and Others v. Commission*, [2002] E.C.R. II-1487.

support. The CFI upheld the findings of the Commission relating to passive sales and sources of supply. The CFI found, however, that the Commission had not sufficiently established the other infringements in law. For example, with regard to the third infringement, the CFI held that according to the documents on file, JCB's actions amounted to the fixing of its own prices, details of which were negotiable, and the drawing up of suggested scales for retail prices. The influence of JCB on retail sales prices was therefore significant, but essentially that of a manufacturer who draws up suggested lists of retail sale prices and fixes invoicing prices internal to its network according to the retail sale prices desired. The retail price scales, though strongly indicative, were not binding. There was therefore, in the CFI's eyes, nothing to indicate that JCB's efforts to influence dealers and discourage them from agreeing to sale prices considered to be too low involved coercion.

#### H. Incorrect method employed in calculating fines

This factor has been taken into consideration frequently by the CFI in order to reduce Commission fines (found in 7 judgments).<sup>246</sup> In order to take account of the actual economic capacity of each undertaking to cause significant harm to competition and in the light of the great disparity in size between the undertakings concerned in *Graphite Electrodes*, the Commission applied differentiated treatment to the different undertakings by grouping the individual undertakings involved. The Commission placed SGL and UCAR in the first group with each receiving a starting amount of € 40 million. In the second group, C/G, SDK and Tokai received a starting amount in fines of € 16 million. In the third group, VAW, SEC and Nippon each received a starting amount in fines of € 8 million. The CFI in its assessment of the correctness of such groupings was satisfied with the first grouping.<sup>247</sup> The CFI had misgivings, however with regard to the second grouping. The CFI held that the fact that SDK and Tokai were placed in the same category, when Tokai's turnover and market share were only half of the relevant figures for SDK, exceeded the acceptable limits from the aspect of the principles of proportionality and equal treatment, more particularly since the difference in size between Tokai and SDK, which belonged to the same category, is greater than that between Tokai and Nippon, which were in two different categories. The CFI therefore dismantled the second category, placing Tokai into a different category. SDK's start amount remained at € 16 million while Tokai was given a start amount of € 8 million. Similarly the CFI considered that C/G, whose turnover was so close to Tokai, in terms of size on the relevant worldwide market, was also to be placed in the same category as Tokai, therefore also receiving a reduced start amount of € 8 million. The CFI decided to maintain the third category. However, the average turnover and average market share of the third category only came to half of the corresponding average figures of the next category consisting of C/G and Tokai, and to one tenth of the figures of the first category, consisting of SGL and UCAR. Consequently the CFI considered, in the exercise of its unlimited jurisdiction, that the starting amount for Nippon and SEC should be fixed at €4 million.

With regard to the weighting of 2.5 applied by the Commission on SDK in order to create a sufficiently deterrent effect of the fine, the CFI held that the Commission decision contained

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<sup>246</sup> This factor has been used to reduce the fine in Judgment of the European Court of First Instance, Case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission*, [2003] E.C.R. II-2597; Judgment of the European Court of First Instance, Case T-230/00, *Daesang Corp. and Sewon Europe v. Commission*, [2003] E.C.R. II-2733 and in Judgment of the European Court of First Instance, Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd. v. Commission*, nyp.

<sup>247</sup> Judgment of the European Court of First Instance, Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd. v. Commission*, nyp.

no finding other than those pertaining to the undertaking's size and global resources which would justify the application to SDK of a multiplier greater than 1.5. In particular it did not explain why the circumstances of the case would require the application to SDK of a multiplier six times higher than that applied to VAW, although its relevant turnover for the purposes of the operation at hand was only twice VAW's. The CFI therefore applied a weighting of 1.5 instead to create a reduced start amount of € 24 million. The CFI judgment concerning the *Graphite Electrodes* cartel is also of interest as though the CFI has never increased the overall fine imposed by the Commission since the introduction of the 1998 Guidelines, it partially allowed the Commission's request to withdraw the reduction of the fine initially granted by the it to Nippon and SGL for not contesting facts as established during the administrative procedure. As a result, as these two companies contested facts before the CFI, which they had previously admitted, the initial reduction imposed by the Commission of the fine was diminished.

## VI. Conclusion

Fines are the only instrument the Commission possesses to sanction and deter infringements of EC competition law. They are thus of greater importance than in other jurisdictions, such as the United States where competition law enforcement agencies have a range of weapons at their disposal, including criminal sanctions, to combat anti-competitive practices. After a twenty year period where fines were relatively low, the Commission has since the beginning of the 1980s considerably stiffened the level of fines imposed on competition law infringers. Record fines for hard-core cartels (*Polypropylene*, *Cartonboard*, *Graphite Electrodes*, *Plasterboard*, *Vitamins*, etc.), as well as for major abuses of dominance (*TACA* and *Microsoft*), have been imposed on a number of occasions. While it may be questioned whether these fines are sufficiently stringent to deter anti-competitive practices, the undertakings on their side argue that these fines are not only too high, but that the way they have been established is often unclear and hard to understand. The lack of clarity of the methods used by the Commission to calculate fines, combined with the fact that the CFI seems often prepared to reduce the amount of the fines imposed by the Commission, has generated a massive amount of litigation on the issue of fines before Community courts. The Commission has attempted to respond to this problem through the adoption of its 1998 Guidelines on fines. However, these guidelines are not free of ambiguities and continue to maintain a high degree of uncertainty as to the calculation of fines. Since 1998, litigation regarding the level of fines before the CFI has not decreased, but seems on the contrary to have increased. Today, appeals against cartel decisions are essentially aimed at obtaining a reduction of the fines imposed by the Commission, rather than demonstrating that the firms in question have been wrongly convicted of cartelistic behaviour. The CFI on its side seems to limit its control to verifying whether the 1998 Guidelines on fines, as well as the 1996 leniency notice, have been complied with by the Commission in its calculation of fines.

Against this background, this paper has attempted to provide a clear picture of the various factors that are taken into account by the Commission in its determination of the level of fines, and the factors taken into account by the CFI in its judicial review of Commission-imposed fines. The factors relied upon by these authorities to impose/review fines tend to vary from one case to the other. However, some trends can be observed. First, most infringements are characterized as severe or very severe. These two categories appear to be fluid, however. For example, while the majority of cartels are considered as very severe infringements, some others are considered as severe. Further, instead of only relying on a legalistic test, the Commission also seems to be looking at the effects of a given practice.

Second, the vast majority of the infringements are of medium or long duration. Third, the most prevalent aggravating circumstance found in the infringements is that of playing the leading role in a cartel. Fourth, the most common attenuating circumstance found in the Commission decisions is that of playing a passive role in a cartel set-up. These last two observations reflect the fact that the majority of Commission decisions imposing fines involve cartels. Fifth, within the context of cartels, section D of the 1996 leniency notice was the most frequently applied during its existence, before the adoption of the new 2002 leniency notice. Finally, the CFI, whose remit to review fining decisions is unfettered, essentially checks whether the 1998 Guidelines or 1996 leniency notice are correctly applied and only rarely endeavours to clarify the principles behind the Commission's fining decisions. Further, it has never increased a fine imposed by the Commission. Indeed, the worst that undertakings can expect at the moment is that the CFI will re-affirm a Commission fine.